In the Supreme Court of the United States

OCTOBER TERM, 1924

THE UNITED STATES OF AMERICA, PETITIONER
v.
GULF REFINING COMPANY

No. 40

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

GOVERNMENT'S BRIEF IN REPLY TO "BRIEF FOR DEFENDANT"

Presumably on the assumption that if this court should conclude there is reversible error in the holdings of the Circuit Court of Appeals, it will then consider questions raised in, but not passed upon by, that court, defendant has included in its brief a discussion of all questions there presented. That the court may have before it the Government's contentions as to all questions involved in the case, there is here reprinted with slight modification, and filed as a reply brief, those parts of the Government's brief used in the Court of Appeals as a reply to the questions of law there raised by defendant.

41731—25——1

PLEA IN ABATEMENT

(Defendant's brief 70–79)

A plea in abatement was filed by plaintiff in error, in which the indictment was attacked—

> because the said pretended indictment was not read or by said Grand Jury, and said Grand Jury did not at any time know the contents thereof, and consequently the said Grand Jury did not vote upon the same.

To this plea the United States demurred, and the court, holding that the demurrer was to be treated as an exception to the sufficiency of the plea and as a motion to strike, after argument by counsel, struck the plea from the record.

The averments, except the concluding clause—"consequently, the said Grand Jury did not vote upon the same"—are identical with those in *United States* v. *Terry,* 39 Fed. 355. The clause referred to is manifestly not an averment in the true sense, is merely an argumentative inference from the preceding averments, and is negligible.

In the *Terry* decision the court ruled that a plea in abatement does not lie, but that the course which should be followed is by way of a motion to quash the indictment.

The plea in abatement, therefore, was rightly stricken.

Defendant also interposed a motion to quash, the averments in the motion being the same as in the

plea except that there was omission of the final argumentative clause.

After argument the court, in its discretion, struck the motion to quash from the record.

This exercise of the court's discretion is amply supported by the *Terry* decision above cited, which contains a full and learned discussion of the law as applied to facts substantially identical with those in the case at bar. It is also fully supported by the following cases:

United States v. *Rosenburgh*, 7 Wall. 580.
United States v. *Avery*, 13 Wall. 251.
United States v. *Hamilton*, 109 U. S. 63.
McGregor v. *United States*, 134 Fed. 187.

THE POINTS RAISED BY DEMURRER

(Defendant's brief 79–112)

FACTS ARE AVERRED IN THE INDICTMENT WITH REQUISITE LEGAL CERTAINTY

The accused is entitled to be apprised of the precise charge brought to enable him to make defense and to avail afterwards of the plea of autrefois convict. The court must be informed of the facts so that it may decide whether they will support a conviction. Hence the rule requiring statement, with reasonable particularity of time and place and circumstance, of *facts* and not mere conclusions of law. Legislative definition of statutory crime may require or permit use of generic terms, but in framing indictments in such cases it may not always

suffice to copy statutory language. In order to satisfy the rule just stated the count must at times descend into particulars. *Armour Packing Co.* v. *United States,* 209 U. S. 56, 83–4.[1]

However, there can be no objection to use of statutory terms provided, in connection with other averments, they are sufficiently descriptive of the offense. In other words, it is sufficient to charge acts falling within the statutory prohibition in the substantial words of the statute provided requisites of good pleading are met. Cf. *United States* v. *Simmons,* 96 U. S. 360.

The gist of the crime denounced by the Elkins Act is " receipt of a concession." In this indictment guilt is imputed and charged by use of this language accompanied with precise averments of date, place, and kind of shipment, names of carriers, destination, route, its interstate character, the published legal rate, the rate for which the shipment was actually carried, and the receipt of a " concession," *with the amount thereof stated in exact figures,* whereby transportation was averred to have been had at rates less than those published.

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[1] Under a statute penalizing " devising of any scheme or artifice to defraud " the bare charge that defendant " devised a scheme to defraud " was held insufficient. Particulars must be alleged from which it may be seen that the scheme was a fraudulent one within the intendment of the statute. *United States* v. *Hess,* 124 U. S. 483, 486–9.

A charge in statutory words of an intent to hinder, etc., enjoyment " of all the rights, privileges, and immunities * * * of citizens because persons of African descent was held bad because it failed to *specify* the rights intended to be interfered with. *United States* v. *Cruikshank,* 92 U. S. 542, 557–9.

Substantially similar indictments were sustained in *Chicago, St. P., M. & O. Ry. Co.* v. *United States,* 162 Fed. 835, 838, and in *Armour Packing Co.* v. *United States,* 153 Fed. 1, 16, 17, affirmed 209 U. S. 56.

Defendant, however, insists that this indictment is demurrable because it charges generically in the statutory language "receipt of a concession," but fails to specify whether the concession " consisted of free demurrage, collection at less than the lawful rate with or without a device, a rebate with or without device, extension of credit, etc." Further, that it fails to specify whether defendant by agreement with a carrier in the first instance paid less than the lawful rate, or whether it paid the full rate, subsequently accepting return of a portion, or whether it received something else of value in connection with the transportation instead of money.

An inspection of the counts shows the want of merit in this connection. Count 1 charges (R. 4) receipt of a concession of 13½ cents per hundred pounds off the rate named in published schedules in force, " *which said concession so accepted and received by the said Gulf Refining Company from the said common carriers amounted in the aggregate to $72.55.*" * * * Other counts are similar.

This is a charge that defendant got its merchandise transported for $72.55 less money than should have been paid. And it excludes the notion that the concession consisted of anything but money or that a rebate was given.

It has been definitely decided (*Armour Packing Co.* v. *United States, supra*) that the use of a device is not an element of the offense and need not be averred. Moreover, the court there denied a contention that the indictment was insufficient because it omitted to set out *of what the concession consisted or how it was granted* (p. 83). When as here the indictment apprises defendant of the particular shipment complained of, of its route from starting point to destination, of the published rate as contrasted with that actually paid for the transportation, an allegation in the language of the statute of receipt of a concession without specification of the methods by which it was obtained is clear and certain to common understanding.

It is not seriously contended here that defendant was actually misled or that lack of knowledge of the real accusation hampered its defense. It was not led to believe that it was charged with accepting a technical rebate or free demurrage or with receiving some benefit other than money. The trial demonstrated that it was at all times fully aware of the conduct on which guilt was imputed.

Section 1025, R. S., reads in part:

> No indictment * * * shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, *which shall not tend to the prejudice of the defendant.*

This provision was applied to a similar indictment by the Supreme Court in *Armour Packing Co.* v. *United States, supra* (p. 84), and it was said:

> There can be no doubt that the accused was fully advised of and understood the precise facts which were alleged to be a violation of the statute.
>
> As we interpret this law, it is intended, among other things, to prohibit and punish the receiving of a concession for the transportation of goods from the duly filed and published rate. Each and all of the elements of the offense, with allegations of time, place, kind of goods, and name of carrier, are distinctly charged in the indictment, and include the fixing of the published rate at 23 cents per 100 pounds; the changing of the rate and the new publication at 35 cents per 100 pounds; the knowledge of this change on the part of the shipper, and the carriage of the goods over a described route at a concession of the difference between the published and the contract rate—all these facts being stated, the indictment is clearly sufficient.

Cf. *Ex parte Pierce*, 155 Fed. 663, 665.

In *Chicago, St. P. M. & O. Ry. Co.* v. *United States*, 162 Fed. 835, 836 (212 U. S. 579), the offense was collection of full rates and the subsequent return to the shipper of an elevator charge not published in the filed tariff. In the indictment this transaction was represented by an allegation (p. 836) that the defendant paid certain

rebates and certain concessions whereby the property was transported at less compensation and rate than that named in the schedules; " that is to say, a rebate, refund, and concession of one-half cent per bushel." It was not specifically averred that the rebate represented the elevator charge. The accusation followed the statutory language charging simply that the railroad granted a " rebate " or " concession " whereby the property was transported at the less rate. It was held that this was sufficiently precise and definite.

In *Standard Oil Co.* v. *United States,* 179 Fed. 614, 617–9, an indictment similar to this stating details of the shipment, contrasting the rate lawfully chargeable with that paid and charging that defendant thereby knowingly accepted and received a concession was attacked because of failure to allege payment of the unlawful rate. It was held that the indictment, by following substantially the language of the statute, charged the gist of the offense—the receipt of the concession—with sufficient certainty and particularity. It will be observed that the averment in the statutory language of the acceptance of a concession was held equivalent in common understanding to an averment of its payment, a fact thought essential to guilt and not otherwise specifically pleaded.

These cases are alike in principle with *United States* v. *Scott*, 74 Fed. 213, 217, which points out that colloquial expressions, utilized in the description of statutory crimes, are also sufficient for use

in the indictment if sufficiently informative. Such expressions may well be regarded not as averments of conclusions of law but as adequate descriptions of *concrete fact.*

THE INDICTMENT NEED NOT AVER COMPLICITY ON THE PART OF THE COMMON CARRIER

Prior to December 2, 1916, all freight of this description was indiscriminately rated as gasoline. Thereafter in the applicable schedules filed the commodity was divided into two classes, "gasoline" and "unrefined naphtha," the published rate on the latter being substantially less. Defendant was convicted on proof showing that on carloads consigned to it as "unrefined naphtha" it paid at destination the prescribed rate for that commodity; whereas the product actually shipped was not unrefined naphtha but gasoline, for which it should have paid the higher rate. Consequently, defendant "knowingly" received a concession of this difference. The carrier, of course, *granted* the lower rate, but it was not averred or proven that it was aware that the shipment was gasoline and not "unrefined naphtha," and, therefore, that it purposely or "knowingly" granted a concession. Is such complicity an essential element of the offense and must it be averred in the indictment?

The history of legislation dealing with discrimination in rates and its judicial construction demonstrate that this contention is based on a narrow and inadmissible interpretation of the Elkins Act.

The purpose of Congress was to cut out by the roots every form of discrimination, favoritism, and inequality.

> *Louisville & Nashville R. R.* v. *Mottley,* 219 U. S. 467, 478.

It is the object of the interstate commerce law and the Elkins Act to prevent favoritism by any means or device whatsoever and to prohibit practices which run counter to the purpose of the act to place all shippers upon equal terms.

> *United States* v. *Union Stock Yard,* 226 U. S. 286, 309.

The Act of March 2, 1889, c. 382, 25 Stat. 857, as amended by § 10 of the Act of June 18, 1910, c. 309, 36 Stat. 539, U. S. Comp. Stat., § 8574 (3), forbids false and fraudulent billing, classification, or other representation whereby, with or without the carrier's connivance, transportation is sought at less than legalized rates. The gist of these offenses is *willful fraud.* But it became increasingly manifest to Congress that by methods falling short of willful fraud shippers could get concessions—often at the carrier's expense and without its concurrence—and that it is often difficult to persuade a jury of the existence of actual bad faith. The constant purpose in the series of acts to regulate interstate commerce being to bring about exact equality, the observance in similar circumstances of the one prescribed rate

by the shipper as well as the carrier, the applicable provision of the Elkins Act has been aptly described as a " catch-all " provision for any practice by either carrier or shipper, which by any device whatever would tend to defeat the purpose of the law.

> *United States* v. *Vacuum Oil Co.*, 153 Fed. 598, 604.

In *Armour Packing Co.* v. *United States, supra,* it is broadly held that if by any method (whether it may or may not be described as a " device " or whether it can or can not be stigmatized as " fraudulent ") the shipper obtains transportation at less than published rates, he offends against this section (209 U. S. 72):

> The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published, and posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published.

In *United States* v. *Metropolitan Lumber Co.*, 254 Fed. 335, 342, defendant procured transportation in violation of an embargo laid on all private

shipments of lumber. The carrier could not and did not know, acquiesce, and connive. The district judge, upon unanswerable considerations, held that such complicity was not an essential of the offense and that the Elkins Act was passed to cover the loopholes which previous acts had left open for discrimination and the exercise of favoritism.

Defendant contends that there is still a loophole left and that Congress has not penalized acceptance of a concession except where the carrier consciously participates. Having regard to the complexity of railroad freight business and to the wide opportunity afforded (as demonstrated by this record) to obtain concessions of which the carrier is or seems to be ignorant, and considering also the difficulty of proving the carrier's actual knowledge, it is believed that this court will not hesitate to deny this ground of demurrer.[1]

WAS DEFENDANT A SHIPPER

Stripped of detail, the counts set forth specific interstate consignments of gasoline from the Gypsy Oil Co. to defendant; delivery to initial carrier; transportation by it and connecting carriers pursuant to instructions given by consignor *and by defendant;* delivery by carrier to defendant in Texas; freight charges (set forth in dollars and cents), *thereupon becoming due by defendant* and

[1] In *United States* v. *Vacuum Oil Co.*, 153 Fed. 598, 604, the court observes that the word "concession" does not necessarily signify or imply that the shipper *solicited* a concession which the carrier could give.

payable to the carrier; receipt by defendant of a concession off the legal rate of a definite sum.

Defendant urges that these allegations fail to show—

(*a*) that it was indebted for the transportation;

(*b*) that it was a "shipper" within the meaning of the Elkins Act.

(*a*) There can be no serious denial that a shipper may incur indebtedness for freight charges who joins in instructions under which the carrier receives, transports, and delivers cargo to such shipper as its consignee. Business is done on these terms by a sort of universal practice or consent. It would entail intolerable prolixity and delay if the government were forced to load indictments with minute details of every circumstance attending a shipment tending to show assumption of freight charges by the consignee. The indictment here states the facts from which the liability arose and charges sufficiently and directly that the consignee *became indebted,* etc. Contents of bills of lading and other documents attending the transaction were properly left for the proof. Defendant was apprised by the indictment of every fact upon which its indebtedness for the proper freight charges arose.

(*b*) The Act of June 29, 1906, c. 3591, § 2, 34 Stat. 587, amending the text of the Act of February 19, 1903 c. 708, § 1, 32 Stat. 847, did not evince intention to relieve consignees from the penalty im-

posed upon consignors, thus deviating from the steadfast congressional purpose to extirpate all manner of favoritism and discrimination in interstate commerce.

By the Act of 1903 it was made unlawful for *any person or corporation* to give or take any rebate, concession, etc., and every such person or corporation was declared guilty of a misdemeanor. One purpose among others of the amendments introduced by the Act of 1906 was to settle the doubt theretofore entertained whether conviction could be had without proving that the act was knowingly or willfully done. *Great Northern Ry. Co.* v. *United States,* 155 Fed. 945, 955 *et seq.* The text was altered to read "every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant or give, or solicit, accept, or receive any such rebates, concession, or discrimination, shall be deemed guilty of a misdemeanor * * *."

The word "knowingly" was inserted and furthermore after the words "every person or corporation" the words "whether carrier or shipper" were inserted in order to make it perfectly clear that illegal purpose must be fastened on carrier as well as shipper. There is no valid evidence of intent to restrict otherwise the generality of the Elkins Act. There is no sound reason for the assumption that the word "shipper" was given a technical significance but every reason to conclude that it was intended to include consignees, since it

must have been known to Congress that a large proportion of freight traffic is actively directed by and a large proportion of freight charges paid by consignees and that the latter are as vitally interested as are consignors in procuring concessions or other favors from the carrier.

These questions were in debate in *United States* v. *Metropolitan Lumber Co., supra,* and the logical conclusion was reached by the district judge that, since goods are in reality transported by the consignee when he pays the freight and since he is the only person in such cases benefited or interested in concessions or rebates, for obvious reasons, unless the very purpose of the act is to be nullified, such a consignee is a shipper within the meaning of the act as he is in fact. Ib. 346.

The words "every person or corporation, whether carrier or shipper" are too wide to permit the inference that an active consignee paying the freight is not included. Cf. *United States* v. *Standard Oil Co.,* 148 Fed. 719, 722.

COUNTS 36 TO 40 AND 81 TO 85 ARE NOT DOUBLE

The statute penalizes acceptance of (1) rebates, (2) concessions, or (3) discriminations. These words differ in meaning, and the practices denoted by them are susceptible of classification. The shipper may illegally get back a part of what has been paid—rebate; pay in the first instance less than the legal rate—a concession; get a preference represented by something besides money—which

may be fairly described either by the word "concession" or by the word "discrimination."[1]

But it seems reasonably beyond cavil that every "rebate" and every "concession," except it be accorded to all shippers alike, is also a "discrimination."

The counts here in question are like the others except for an averment that an outside company shipped gasoline during the same period by the same route, paying full legal rates. They charge receipt of concessions by defendant whereby transportation was had at less than legalized rates and *whereby a discrimination was practiced in favor of defendant and against the outside company.*

Under the statute it is unlawful to "receive any rebate, concession, or discrimination" whereby property shall be transported at less than legalized rates "or whereby any other advantage is given or discrimination is practiced," and receipt of any such rebate, concession, or discrimination is made a misdemeanor.

The counts specified what the discriminations charged were, viz, transportation at less than legalized rates. No discrimination other than this was averred. There was but a single charge included in each of these counts, namely, receipt of a concession which was at the same time a discrimination; or, conversely, receipt of a discrimina-

[1] Cf. *United States* v. *Metropolitan Lumber Co.*, 254 Fed. 335; *Dye* v. *United States*, 262 Fed. 6; *Hocking Valley Ry. Co.* v. *United States*, 210 Fed. 735.

tion by means of a concession from the published rates. There was no effort to charge two offenses growing out of one and the same shipment. Defendant was accused of and is to be punished for but one offense—a single act which, however, under the statute was illegal because proved to be both a concession and a discrimination. Authorities abundantly sustain the validity of the counts.

It is a commonplace of criminal practice that when a statute forbids the doing of several things not repugnant to each other, defendant may by a single act violate all the prohibitions or some one or more of them. In either case he may properly be charged in a single count with violation of all the forbidden things and convicted for one offense if the proof shows that he violated any one or all of them. Bishop's New Criminal Procedure (2d ed), § 436.

In *Crain* v. *United States,* 162 U. S. 625, 636, it is said:

> The statute was directed against certain defined modes for accomplishing a general object, and declared that the doing of either one of several specified things, each having reference to that object, should be punished. * * * We perceive no sound reason why the doing of the prohibited thing, in each and all of the prohibited modes, may not be charged in one count, so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute.

The statute under consideration is violated by the mere offer or by the actual grant of a rebate. Giving a rebate includes both grant and offer. If but stages of the same transaction and committed by one person, the entire act may be properly included in one count as a single offense.

United States v. *Delaware, L. & W. R. Co.*, 152 Fed. 269, 273.

United States v. *Great Northern R. Co.*, 157 Fed. 288, 290.

Cf. *United States* v. *Fero*, 18 Fed. 901.

United States v. *Heinze*, 161 Fed. 425, 427.

Lehman v. *United States*, 127 Fed. 41, 45.

DURING FEDERAL CONTROL THE PROVISIONS OF THE ELKINS ACT RELATING TO OFFENSES BY SHIPPERS WERE IN FORCE

The act forbids rebates, concessions, etc., *in respect of interstate transportation by any common carrier subject to the act to regulate commerce.* It is argued that during federal control it became inoperative because the government was not a *common carrier subject to the act to regulate commerce.*

If this reasoning be sound, it would follow that every offense against person or property denounced by federal or state law was likewise immune from punishment provided the applicable statute, in defining the offense, employed words similarly linking the forbidden act with the property or the instrumentalities of the *common carriers* taken over by the government. The mind

recoils from this consequence, and it is, of course, obvious that it was not so intended either by the Executive or by the Congress.

Temporary control of the railroads was taken for war purposes. As is well known, they continued as before to serve the public as common carriers *in fact;* the government simply stepped into the place of the corporate owners, continuing through the old organization to furnish transportation to all alike and *to act as common carriêr in fact if not in law.* All freight and passenger traffic offered was transported as usual except as delayed by war needs.

It is only because of certain peculiar rights and obligations attaching to the status that the "common carrier" is distinguished from other business agents. If these rules of law are applied (and there is no natural reason why they should not be) to transportation facilities operated by the government, then the government becomes in law, as it is in fact, a common carrier. Moreover, there is in the nature of things no reason why government should not furnish transportation to private shippers (so far as compatible with paramount duties imposed on the sovereign by the war) without discrimination in accordance with existing acts regulating commerce; nor why the penal sections of these laws should not continue their wholesome restraint upon self-seeking shippers and railroad officials.[1]

[1] Subjection of a government-owned ship to the legal incidents attending operation of an ordinary private merchant vessel is illustrated by *The Lake Monroe*, 250 U. S. 246, 254, et seq.

It is believed that this result was intended and established as law, as shown by the following citations:

> Act of August 29, 1916, c. 418, 39 Stat. 619, 645; U. S. Comp. Stat., § 1974(a), authorizing control of transportation.
>
> The President's proclamation of December 26, 1917, 40 Stat. 1733.
>
> Secs. 1, 8, 9, 10, and 15 of the Act of March 21, 1918, c. 25, 40 Stat. 451; U. S. Comp. Stat. 1919, Supp., §§ 3115¾ a, h, i, j, o.

To escape the plain significance of these provisions defendant urges:

(*a*) That the common carrier status may not logically be attributed to transportation systems under federal control because the government was not bound to serve all alike, but had power to lay embargoes or otherwise discriminate in favor of military traffic.

It suffices to reply that in time of war it was already the statutory duty of common carriers to accord preference and precedence to military traffic.

> *Interstate Commerce Law*, § 6, as amended by the Act of August 29, 1916, c. 417, 39 Stat. 604; U. S. Comp. Stat., § 8569(8).

No one would contend that in the absence of federal control, or before it began, obedience to this statute took from the railroads their status as common carriers in respect of private traffic and thus suspended all laws controlling it. Nor were the provisions of § 10 of the Federal Control Act

imposing common carrier responsibility on "carriers while under federal control" nullified because of the powers granted to meet the military emergency.

(*b*) Something is made also of that part of the Elkins Act which imputes to the incorporated common carrier certain guilty conduct of its agents and of the absurdity of imputing guilt to the government when it stepped into the carrier's place.

Paradox like this is always attractive to juvenile curiosity and when aided by the wit and ingenuity of the scholiast can be carried far. But in serious business it has little place. Counsel find no difficulty in admitting that, since the government may not punish itself, this part of the law was suspended during federal control.

But is there anything in the cited texts or elsewhere from which to deduce the intention to obliterate the penalties imposed by the act on individuals and private shippers? Is it not on the contrary clear that both executive action and applicable federal legislation in respect of federal control not only did not suspend but kept in force the common carrier status and the regulatory acts of Congress as regards ordinary traffic?

By the act of 1916 military possession and control was authorized to the exclusion of other traffic *but only as far as might be necessary.* The President by virtue of this authority undertook on behalf of the government the duty of performing (as far as possible) the usual and ordinary business

and duties of common carriers, explicitly announcing, moreover, his intention to operate and control these systems of transportation subject to existing statutes and orders of the Interstate Commerce Commission, etc., except as otherwise determined and declared by specific orders. This declaration and act of the President was recognized and given the force of law by the Federal Control Act of 1918, reciting the President's action; providing methods for compensating the carriers; authorizing the President to execute any of the powers therein or theretofore granted him with relation to federal control through such agencies as he might determine (§ 8); continuing the provisions of the Act of August 29, 1916, *supra,* and conferring on the President the further and other powers necessary and appropriate to give effect to the powers then and theretofore conferred (§ 9). Finally (§ 10) carriers while under federal control were made subject to all laws and liabilities *as common carriers,* whether arising under state or federal laws or at common law, except so far as inconsistent with legislation or orders of the President. Keeping in mind that the word " carriers " here employed means " railroads and systems of transportation," and that the words " federal control " mean the action of the President taking over possession, use, control, and operation (see § 1), how can it be said that these railroads while operated under this connected and linked series of statutes and executive orders were not by force of the actual text of the

Federal Control Act common carriers of persons and property subject (in accord with the President's declaration as ratified by that act) to applicable existing statutes and orders of the Interstate Commerce Commission?

In *Missouri Pac. R. Co.* v. *Ault*, decided June 21, 1921, 41 Sup. Ct. 593, it was held that since federal control displaced corporate management the carrier corporation could not be held liable for a penalty imposed by Arkansas law. Moreover, that § 10 of the Federal Control Act should not be construed as imposing liability on the government for a *penalty*. The points actually decided are not important here, but in the course of the opinion several points relevant here are cleared up. It is pointed out that the authority exercised by the President was confirmed by the Federal Control Act; that the phrase "carriers while under Federal control" must be interpreted as provided by § 1 and as pointed out in this brief; that by § 10 and § 15 the United States submitted itself to the various laws, state and federal, which prescribe how the duty of a *common carrier* by railroad should be performed and what should be the remedy for failure to perform; that the plain purpose of § 10 was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President except in so far as such rights or remedies might interfere with the needs of federal operation.

The trend of these remarks and their bearing on the case at bar are manifest.

In *United States* v. *Metropolitan Lumber Co.*, 254 Fed. 335, 349, the present contention was raised and overruled in an able opinion by District Judge Haight.

In a series of cases decided during federal control the Interstate Commerce Commission exercising powers conferred by the acts to regulaate commerce administered various important sections of these acts, holding that they remained in full force and effect except in so far as inconsistent with the federal control act and with the orders of the President.

> *Johnston* v. *A. T. & S. F. Ry. Co.*, 51 I. C. C. 356, 361.
>
> *Inland Steel Co.* v. *Director General*, 57 I. C. C. 339, 342.
>
> *Waste Merchants Assoc.* v. *Director General*, 57 I. C. C. 686.
>
> *Frost & Co.* v. *Director General*, 57 I. C. C. 755.
>
> *Indian Refining Co.* v. *Director General*, 59 I. C. C. 246, 248.
>
> *Dupont De Nemours & Co.* v. *Director General*, 60 I. C. C. 621.

It may also be observed that Congress recognized the continued application to federal control of the inhibitions of the Interstate Commerce Act relating to unjust, unreasonable, and discriminatory rates and classifications, regulations, etc.

> *Transportation Act, February 28, 1920*, 41 Stat. 456, 462, § 206(c).

In further support of this proposition the court will observe that existing law regulating tariffs was specifically *modified* (§ 10) so as to permit the President to *initiate rates, etc., not as usual to be subject to suspension* by the Interstate Commerce Commission, but leaving to that body the power to weigh the reasonableness of such rates and to make findings enforcible as provided in the acts to regulate commerce. Cf. *Director General* v. *Viscose Co.*, 41 Sup. Ct. 151.

What did this limited though important modification of existing law as to railroad rates signify? Is it not a legislative declaration that (except as specifically modified) this system of law in all other respects remained in force and continued to govern the operation of the government as a carrier of person and property?

Existing law and the common carrier status were not affected by federal control except such features as were inconsistent therewith. It is waste of space to argue at length that the penal statute here considered is entirely consistent with federal control. Prevention of discrimination secured by unfair concessions such as are in issue here was as important during the war period as before and as now.

The offense as defined by the statute and as charged in these counts was receipt of a concession whereby the property was transported at less rate than that named in the published and filed tariffs.

The point is made that the indictment fails to aver that tariffs were filed and published by the government.

Each of the challenged counts (cf. count 36, R. 54) avers that the President assumed control and operated the railroads of the three carriers over whose lines the freight was transported * * * *which contol, operation and utilization is herein termed federal control;* that from January 1, 1918, to June 1, 1918, *said three common carriers under federal control* had printed and filed with the Interstate Commerce Commission and had published schedules and tariffs of rates and charges * * * which showed that the lawfully established rate for the transportation of gasoline * * * was thirty-three cents for each hundred pounds. * * *

Considering that the italicised words, *supra,* were authoritatively defined by § 1 of the Federal Control Act as construed in the *Ault case, supra,* it becomes at once manifest that the criticism is not applicable to the averments in this indictment, since they charge directly that the filed and published tariffs on which the concession was obtained were established as such under the applicable law by the direct action of the government operating the three transportation systems under federal control.

ALLEGED ERRORS OCCURRING ON THE TRIAL

THE DIRECTION OF A VERDICT OF ACQUITTAL

(Defendant's brief 112–122)

The contention of plaintiff in error that the court should have directed a verdict of acquittal is fully discussed in the Government's original brief.

THE NATURE OF THE CONTROVERSY DOES NOT BRING THE CASE WITHIN TEXAS & PACIFIC RY. CO. V. AMERICAN TIE & TIMBER CO., 234 U. S. 138

(Defendant's brief 122–129)

In that case an administrative question was involved—whether any rate was in existence covering railway ties. Here no such question arose. It is undisputed that the tariffs included the commodity shipped. The question therefore is not whether an article is omitted from the tariffs, but whether it is one or the other of two commodities concededly designated therein.

Kansas City So. Ry. Co. v. *Wolf*, 272 Fed. 681 (8 CCA).

Butler Motor Co. v. *Atchison, etc.*, 272 Fed. 683 (8 CCA).

National Elevator Co. v. *Railway Co.*, 246 Fed. 588 (8 CCA).

Pennsylvania R. Co. v. *International Coal Co.*, 230 U. S. 184.

Pennsylvania R. Co. v. *Puritan Coal Co.*, 237 U. S. 121.

Illinois Cent. R. Co. v. *Mulberry Coal Co.*, 238 U. S. 275.

Pennsylvania R. Co. v. *Sonman Coal Co.*, 242 U. S. 120.

St. Louis, I. M. & S. R. Co. v. *Hasty & Sons*, 255 U. S. 252.

Hocking Valley Ry. Co. v. *United States*, 210 Fed. 735.

Barrett v. *Gimbel Bros.*, 226 Fed. 623.

Dye v. *United States*, 262 Fed. 6.

Reliance Elevator Co. v. *C. M. & St. P. Ry. Co.* (Minn.), 165 N. W. 867.

Merchants' Elevator Co. v. *Gt. Northern Ry. Co.* (Minn.), 180 N. W. 105.

THERE WAS NO ERROR IN ADMITTING TESTIMONY THAT PRIOR TO DECEMBER 2, 1916, THE ARTICLE IN QUESTION WAS SHIPPED BY THE GYPSY OIL COMPANY TO PORT ARTHUR AND ELSEWHERE AS GASOLINE, AND THAT SUBSEQUENT TO THAT DATE IT WAS SHIPPED TO THE DEFENDANT AT PENNSYLVANIA AS GASOLINE; NOR IN ADMITTING TESTIMONY THAT OTHER CASING-HEAD PRODUCERS SHIPPED THE SAME ARTICLE AS GASOLINE AND THAT IT WAS EVERYWHERE REGARDED AS SUCH

(Defendant's brief 129–157)

The general principles of relevancy governing such testimony are well established.

Chicago Great Western Ry. Co. v. *McDonough*, 161 Fed. 657 (8 CCA).

Grand Trunk R. R. Co. v. *Richardson*, 91 U. S. 454.

District of Columbia v. *Armes*, 107 U. S. 519.

1 *Wigmore on Evidence*, § 461.

1 *Jones on Evidence*, § 141–a.

The defendant contends that before such proof is admissible there must be a showing that condi-

tions are substantially the same—a proposition we do not dispute. To establish similarity it is contended that the proof must show that the shipper had the choice of two rates, one on unrefined naptha and the other on gasoline. The argument is that though this article was not gasoline, it nevertheless had to be shipped as such, gasoline being the nearest approach. Singularly enough this overlooks the fact that it is a crime for an interstate carrier to transport an article not embraced in the tariffs.

> *Southern Ry. Co.* v. *Reid,* 222 U. S. 424.
> *Texas & Pacific Ry. Co.* v. *American Tie & Timber Co.,* 234 U. S. 138.

If therefore this article was not gasoline both the Gypsy and this defendant were guilty of inducing the carriers to commit a crime in transporting it without an appropriate tariff. The defendant therefore stultifies itself if it resorts to such an argument.

Proof of the acts and declarations of the employees of the Gypsy Oil Company in shipping and calling this product gasoline is admissible because the evidence indicates that the Gypsy was under the complete domination and control of the defendant's officers, as much so as the defendants in *United States* v. *Reading Co.,* 253 U. S. 26, and *United States* v. *Lehigh Valley R. R. Co.,* 254 U. S. 255. In short, the relation of principal and agent existed. Donovan, now dead, was general superintendent in Oklahoma of both the *defendant and the Gypsy* (246).

But the evidence was admissible on a broader ground—on the same ground that the acts of other casing-head producers were admissible. To establish that the article was in fact gasoline, it was proper to prove, as was done, that not only the defendant and the Gypsy but all other casing-head producers regarded it as gasoline and shipped it as such, and that everyone around the plants, as well as the public, called it gasoline.

But defendant further contends that similarity was lacking because the evidence did not establish that the naphtha blend used by other producers corresponded to the Gypsy's proportion. The record makes it clear that a substantial similarity existed. Page references to the testimony are given in our outline of the case, and need not be repeated here. There was testimony showing the proportion of the blend at certain designated plants. And League, who was familiar with practically all the casing-head plants in Oklahoma as well as elsewhere, said that the proportion ran all the way from 25 to 95 per cent (447), although only cars containing a substantial amount of casing head—at least 40 per cent—were shipped (454). The defendant admitted that both before and after December 2, 1916, the article was shipped by producers as gasoline (426–7). See *Hedden* v. *Richard*, 149 U. S. 346.

Defendant contends that a custom or usage to be binding must be certain, uniform, general, known, not contrary to law, and not contradictory.

But defendant misapprehends the scope of the authorities cited to establish this. They pertain to cases where one party seeks to incorporate into a contract a custom or usage which he claims measures the obligation of his adversary. Manifestly before a custom or usage can be written into a contract the elements just mentioned must be shown. But that is not this case. Evidence was admitted to show that the article was in fact gasoline—that it was so regarded by shippers and the public alike. It was admissible under the same principles of relevancy as the evidence introduced in cases like *Chicago Great Western Ry. Co.* v. *McDonough, supra,* decided by this court.

Burrell, the defendant's leading expert, testified that when blended 30% naphtha and 70% casing head, and in the case of weathering, merely weathered down to the vapor tension rules provided by the I. C. C., it is not gasoline, but it is very popularly called gasoline (693–4).

DISCRIMINATION AGAINST THE TEXAS COMPANY

(Defendant's brief 158–161)

The statement that the material shipped by the Totem to the Texas Company was not shown to be of the same degree of blend as the Gypsy product is unwarranted. Its gravity was 71 or 72 (333). The gravity of the Kiefer product ran from 70 to 85 (640, 685, and Exhibits 66, p. 1271; 77, p. 1295; 78, p. 1301; and 80, p. 1308); the Drumright product, 76 or 77 (243, 596); the Jenks product,

77 or 78 (594). The casing-head gasoline produced at the various Oklahoma compression plants is a similar product produced by similar means (209–12, 329, 340, 395–398, 416–9, 421, 427–8, 457–461, 462–3). The evidence is undisputed that the naphtha blend reduces the gravity. The similarity, therefore, of the gravity of the Totem product with that of the Gypsy's shows that the article was substantially the same. Anderson, who did not know the exact proportions, said that the proportion is regulated according to the gravity of the gasoline (329). In addition to all this the defendant admitted that some, if not all, of the shipments contained about 1/3 naphtha (382).

Inasmuch as the defendant concedes that the evidence complained of was admissible if the *legal* rate was in fact what the government alleges it to be, further argument is unnecessary.

But the defendant contends that error was committed because the court excluded defendant's exhibit 142 (1463–78), a copy of a complaint filed in Texas by the Texas Company against the Director General to recover back improper freight charges; the first count alleging a discrimination against the Texas Company, and the second that the gasoline rate was improperly assessed. The bills of lading described the article as gasoline (Exhibits 22–5, 972–8), and the evidence was undisputed that the carriers collected from the Texas Company the gasoline rates. If therefore the unrefined naphtha shipped to the Gulf Company was in fact gasoline,

it is manifest that a discrimination against the Texas Company resulted when the Gulf Company paid not the gasoline but the unrefined naphtha rate. The self-serving and hearsay declarations of the Texas Company in its suit against the Director General do not alter the situation, nor tend in any way to prove the absence of discrimination. The evidence was inadmissible for any purpose.

OPERATION OF AUTOMOBILES ON CASING-HEAD GASOLINE

(Defendant's brief 162–164)

Defendant contends that " Evidence that certain witnesses had operated automobiles with insufficiently identified materials, admitted as tending to show that proper name of material shipped to defendant was gasoline, was incompetent and prejudicial." One of the defendant's experts had testified that casing-head gas itself will not run a car (695); another, that he had tested at the Mellon Institute the material commonly called casing-head gasoline and that the engine would not run at all (759). Furthermore, the defendant's experts in defining gasoline said that it must be a product that will satisfactorily run a motor engine (691, 743). They also said, on numerous occasions, that casing-head gasoline could not properly be termed gasoline.

The evidence complained of was therefore competent to meet this situation. As pointed out elsewhere, the proof indisputably established that all the Oklahoma compression plants produced substantially the same product by similar means.

THE EVIDENCE INTRODUCED BY THE GOVERNMENT RESPECTING THE OPERATION OF THE PACKARD CAR WITH CASING-HEAD GASOLINE, THAT WAS LATER STRICKEN

(Defendant's brief 164–5)

The Government in rebuttal placed Dykema on the stand. He testified in substance that he hired a Packard car and drove to Brady, Swanson & Colley's plant at Jenks, where, after first thoroughly draining the tank, casing-head gasoline of 85 gravity and 17½ pounds vapor tension was purchased and put into the tank. With this material no trouble in running the car was experienced, a speed of 35 miles an hour being attained on the way back (826–30). Moss, from whom the material was purchased, testified that it was raw casing-head gasoline of 85 gravity; that he saw the tank drained; that it was then filled with this new material; and that the car drove away (808–9). On surrebuttal the defendant produced O'Donnell, the driver, who said that in draining the car he opened but one drain, but on returning to Tulsa he discovered that a reserve tank, the existence of which he was at the time unaware of, must be drained, too (893). The court's own examination of the witness indicates that it looked with marked suspicion upon his testimony, evidently doubting whether the truth was being told (893–4). But in the end the court, after remarking that he did not like the witness's attitude, struck out the testimony with respect to the test and admonished the jury to disregard it.

This plain and simple recital shows how devoid of merit is the contention that error was committed. The testimony was merely corroborative of that mentioned under the preceding heading.

MUTILATION OF RECORDS

(Defendant's brief 166–175)

The argument advanced by defendant is apparently made, not to show error in the trial court's rulings, but to explain as best it can the damaging testimony introduced below. The following explanation of why the records were mutilated is certainly not impressive.

"The most natural, reasonable, and plausible explanation as to how these erasures and deletions occurred is apparent from the evidence. The boys handling these records had been given certain instructions, which they failed to carry out at once. Upon finding the matter becoming the subject of inquiry, it was the most natural thing conceivable that they would endeavor to conceal their failure to carry out instructions by making these erasures." (Brief 169.)

These mutilated records disclose that for a long while after December 2, 1916, when the shipments were first moved under the unrefined naphtha rate, the inspectors, whose duty it was to make tests and record the results, habitually designated the Kiefer product as "Kiefer gasoline." (The mutilation consisted in erasing gasoline, a magnifying glass

being needed to discern it.) These inspectors are referred to by defendant as "boys," but their ages, if that is at all material, ran from 18 to 27 (295).

The defendant's statement that the test sheets were nothing but lead pencil blotters is unwarranted (493–501, 578), although it is really immaterial whether they were or not. In this connection it may not be amiss to say that Timmons denied that he gave instructions to the inspectors how the material should be designated (291), but others testified that Timmons would indicate what kind of oil it was (494, 496). At any rate, Timmons testified that the laboratory testers used the name commonly employed around the plant (319–320). Although he also said that this unrefined naphtha was called everything around the plant—Kiefer gas; Chain Lightning; Over the Top; Hold it in her; Gilbert; TNT—(321), it was nevertheless designated as Kiefer gasoline on these mutilated records.

The defendant's contention that all this testimony has no bearing in proving guilt, because there was no proof that the mutilation was made by authorized employes for whose conduct defendant is answerable, needs no refutation. Indeed the defendant can not argue error in the face of its admission on the trial:

> And now for the first time we have information that leads us to believe that these erasures were made by an employe of the

> Gulf Refining Company subsequent to the beginning of the investigation by the government and we now make this statement so the court can be thoroughly informed of the actual conditions and also make it to be used *as an admission in this case* in so far as it may be pertinent subject to inquiry (511–512).

(Whether the whole or only a part of this admission was subsequently stricken, 512, is problematical.)

Another mutilation consisted in tearing off from the Port Arthur records the headings of monthly statements reading "Receipts of Kiefer gasoline," the mutilation not being discovered until agents of the Interstate Commerce Commission inspected similar copies at the Pittsburgh office.

RATES

(Defendant's brief 175–183)

The defendant is frank enough to admit that its contention is technical. One of the arguments advanced is that the product in question can not be shipped under the tariffs as gasoline, it not being a petroleum product. "It is not known"—so the argument runs—"whether casing-head gas comes from petroleum at all or not" (176–7). We pass this by as undeserving of reply.

The next argument—also concededly technical—is that no rates were legally in effect during federal control, the contention being that the President's proclamation taking over the railroads (40 Stat.

1733) and the Director General's Order No. 1 of December 29, 1917 (1461–2), directing existing rate schedules to be observed, did not have that effect. We likewise pass this by as meriting no reply.

One statement, however, must not go unchallenged. We refer to the assertion, repeated in different forms throughout the brief, "that the rates on unrefined naphtha were established by the carriers at defendant's request for the express purpose of transporting the traffic involved." It is true that the unrefined naphtha rate was established at defendant's request. There is nothing, however, in the record indicating that the carriers in publishing the rate ever said they did so to enable the defendant to transport *gasoline* as unrefined naphtha. Powers, of the St. Louis and San Francisco, said that Ellis proposed a rate, saying he was going to ship naphtha. "He explained it was a *low grade* article to be shipped to Port Arthur and to be there finished and reshipped" (565). Later he said: "We were requested to put in a rate on crude naphtha or unrefined naphtha or unfinished naphtha, I don't recall which. We put it in on the regular basis." Hereupon the court asked the witness if this was done without investigating what the commodity was. The witness replied: "That is impossible. We can't go out into the field. We don't know what is being shipped. We are hundreds of miles removed from the shipping point" (571). Again, "You ask if my knowledge and conception of the term unrefined naphtha extend to knowing

whether or not there was embraced within that term naphtha produced either by casing-head compression plants or by a topping plant. I don't think we could or would take into consideration the different methods of production. That made no difference to us. It was merely a question whether the product was unrefined naphtha" (572). Again, that if a shipper asked for a rate on brick it would not be assumed he was shipping stone. And if a refiner asked us to make a rate it is assumed he will ship what he is asking for (575). This is sufficient to dispose of the defendant's statement that the rate was published for the express purpose of transporting the traffic involved.

THE REJECTION OF EVIDENCE OFFERED BY DEFENDANT

(Defendant's brief 183–192)

LXII. On cross-examination League was asked to state what the controversy was between him and another inspector over the mode of describing the Gypsy's product; also whether he ever had any instructions from the head of the Bureau of Explosives as to how the commodity should be billed. In holding these questions improper the court expressly told the defendant that it might prove what advices, if any, the inspectors had given the Gypsy as to the proper manner of billing—an offer which the defendant failed to embrace (438). It is plain that what the defendant sought to elicit was hearsay testimony. From any point of view the questions were not proper cross-examination.

LXIII. League was asked on cross-examination whether at a meeting of casing-head producers in 1918 to discuss rules proposed by the Bureau of Explosives to the Interstate Commerce Commission objection was made that there was divergence in nomenclature of this particular article between the tariffs and the safety transportation rules. The court properly ruled that the question was objectionable as collateral and hearsay.

LXIV. We dispose of this with the statement that no exceptions were taken. But independently of that there is no merit in the argument advanced.

LXV. An examination of Powers' testimony leading up to the rulings complained of will disclose how devoid of merit is the contention that error was committed in refusing to permit the witness to answer the two questions put to him. (See his testimony set forth under the preceding heading.) The court rightly ruled that the tariff would speak for itself.

LXVI. The Texas statute did not become a law until March 24, 1919. The indictment period does not run beyond March 12, 1919. But independently of this it was inadmissible. It was offered, to use the defendant's language, "upon the theory of negativing the implications sought to be raised by the government's testimony that the material shipped was customarily called gasoline." (Brief 190.) The very fact that specifications are prescribed admits that there are gasolines of other specifications.

LXXI. The rejection of the Oklahoma statute was entirely proper. It provides that gasoline exceeding 74 gravity is deemed unsafe and its sale for *vapor stoves or other domestic uses* prohibited. It clearly recognizes that a liquid may be gasoline, even though in excess of the gravity prescribed. It had no tendency to prove that the material in question was not gasoline. (Defendant's statement that the material shipped ran from 74 to 84 degrees is incorrect. Some of it was lower than 74.)

LXXIII. DeBarr was asked on cross-examination: "Do you know what is the fact, what the Corporation Commission of Oklahoma has done with respect to ruling as to whether or not taxes should be paid on this material as gasoline, whether inspected and taxed for gasoline?" An objection was sustained (884–5). The error complained of falls within *Packet Co.* v. *Clough,* 20 Wall. 528, 542; *Railroad Co.* v. *Smith,* 21 Wall. 255, 261; *Thompson* v. *Bank,* 111 U. S. 529, 535; *Shauer* v. *Alterton,* 151 U. S. 607, 617.

But independently of this the question was irrelevant. The action of the Oklahoma Corporation Commission in taxing or failing to tax such material as gasoline can not be considered in determining the meaning of the tariff.

OTHER ERRORS RELIED ON IN THE EXCLUSION OF EVIDENCE

(Defendant's brief 193–201)

LXI and LXX. The defendant contends that under *Lehigh Coal & Nav. Co.* v. *United States,*

250 U. S. 556, it should have been permitted as bearing on the question of intent, to introduce certified copies of the pleadings and of a temporary injunction in a suit instituted by it to enjoin the Director General from assessing gasoline rates. The indictment period, it will be recalled, ends March 17, 1919. The defendant's injunction suit was brought July 21, 1919. It is true, as defendant states, that this suit was filed before the indictment, but the record discloses that Stewart, whose business it was as an agent of the Interstate Commerce Commission to recommend after investigation prosecutions of shippers and railroads for violations of the Interstate Commerce act (506), was conducting an investigation at Port Arthur as early as May 2, 1919 (606), and at Pittsburgh as early as May 20, 1919 (543–4; Ex. 95, 1375). Clearly the bringing of this injunction suit *after* the indictment period had no tendency to disprove intent *during* that period. (The lower court, it will be remembered, expressly told the defendant that it might introduce proper testimony to negative intent, 438.)

LXVII. The objection is too refined to argue. Besides it is disposed of by the cases cited under LXXIII.

LXVIII. The question complained of was improper. Bacon & Hamor's definition of unrefined naphtha was in evidence. Whether it comprehended the casing-head product was a matter the jury could easily determine. Besides, in answer-

ing the very next question the witness answered the one now complained of.

LXXII. It is urged that error was committed because the court, in the course of an unrestricted cross-examination, sustained an objection to this question: "Are you able to state what are the finished commercial products of an ordinary petroleum refinery?" This in no way was material to the testimony given on direct. Besides, the long cross-examination that followed covered the very matter which defendant now says it sought to elicit.

IMPROPER CONDUCT ON THE PART OF GOVERNMENT COUNSEL AND THE COURT

(Defendant's brief 201–6)

LXXV. An examination of the record will disclose that the government sought to introduce certain Indian leases in favor of the Gypsy, a subpœna to produce them having been served (261, 167–8). The purpose was to show that the Gypsy in paying the lessors their royalties had done so on the basis that the product taken out of the wells was gasoline. A long argument over their introduction ensued (269–272). The court asked Payne what authorities he had to support his contention. The latter proceeded to read a passage from Cyc dealing with admissions of conspirators, when the defendant took the exception now relied on. Its frivolousness impelled the court to say: "Oh, they have a right to do that. We haven't time to take that up. You may have an exception." (274).

LXXVI. This is so wanting in merit that we content ourselves with a mere reference to the page (308) where the proceeding complained of occurred.

LXXIX. How devoid of merit is this assignment is shown by the very form of the exception taken: "I desire to except to the statement of counsel for the government, in the presence of the jury, being argumentative, concerning the construction——" (570).

XXX. It is indeed strange that this assignment should be urged. The witness had identified the exhibit as an original record of defendant's, in his own handwriting (466). After he had read the items now complained of, the exhibit was admitted with defendant's consent (472).

LXXVII and LXXVIII. Our only comment is to invite attention to pp. 360 and 363–4.

CXVIII. An exception was taken to Payne's argument to the jury that the defendant (through Ellis, its traffic manager), having failed to get a reduction by legitimate means of the gasoline rate in effect prior to December 2, 1916, resorted to illegitimate means to attain that end. The evidence amply warranted this statement. Indeed the jury's verdict confirms this. Besides, the defendant admits in its brief (269) that it had long sought rate reductions, "asking for them, however, *under the name 'gasoline.'*"

Complaint is made that Gann in arguing to the jury asserted that one of defendant's witnesses

came from the Mellon Institute, which was founded by the Mellon family of Pittsburgh, and that W. L. Mellon was defendant's president. There was evidence that the Institute was founded by a Mr. Mellon (766), but there was no proof that W. L. Mellon was defendant's president; on the contrary, that Davidson was (766). Gann's remark was, therefore, unsupported by the testimony. But if the record counts for anything, his conduct throughout the trial was clean and exemplary, and it is quite evident that the remark was innocently made, with no intention deliberately to misstate a fact. The court told the jury to disregard it (906).

It is next urged that Gann and Chambers made improper remarks, the former in saying that by reason of federal control the government had suffered financially as a result of the transaction in question, the burden being upon the public to bear; the latter in commenting on defendant's wealth, in saying it had deprived the government of thousands of dollars and that it had violated the safety transportation rules. What they really did say will be found at pp. 906–08. The exceptions—not taken until the following day—are of narrow scope (908). The court, after remarking that both sides went outside the proper domain, *without any objection being made,* cautioned the jury to disregard the remarks now complained of (908).

It is next urged that Chambers improperly referred to the proceedings before the grand jury. In this connection it should be borne in mind that the defendant expressly admitted on the trial that

the records had been mutilated before their production on that occasion (507). They were brought under subpœna either by Tryon, general manager, or Abel, assistant superintendent (506).

But the whole matter was again brought to the jury's attention just before the charge began. The court a second time admonished them to disregard the matters now complained of (911).

A VERDICT OF ACQUITTAL

(Defendant's brief 206–209)

We shall of course not pause to answer the contention that the court should have directed a verdict. The defendant deplorably misconceives the evidence when it says (290) that there was a complete failure to prove that defendant knew of the existence of the gasoline rates.

DEFENDANT'S REQUESTS FOR INSTRUCTIONS WERE PROPERLY REFUSED

(Defendant's brief 210–217)

It is urged that requests 2, 3, 4, 8, 9, 11, 12, 13, 15, and 16 should have been given because of the distinction they draw between gasoline and unrefined naphtha. It is argued that the jury should have been instructed that the defendant could not be convicted if the material shipped could be properly designated under either term. The charge given disposes of this. The jury could not have been misled in this respect. See in particular pp. 917, 923, 924, 925.

It is next urged that requests 5, 6, 14, and 18 should have been given, the theory apparently be-

ing that the jury should have been told that the defendant was not charged with misbilling, but with accepting concessions. Number 14 is the only one bearing on this matter, the other covering different subjects. The court's instructions, however, make it plain that the defendant was not charged with misbilling.

Number 7 was properly refused. The first part is bad. Furthermore, it is not true that the evidence complained of was "admitted solely for the purpose of establishing the intent." It was admitted for the purpose of establishing the proper name of the commodity shipped.

Number 17—"If you are in doubt whether casing-head gasoline is a product of petroleum oil, you must find defendant not guilty"—was properly refused. We do not pause to answer the argument advanced.

It is urged that number 19, designed to instruct the jury that it must be convinced beyond a reasonable doubt upon each element of the offense, should have been given. But the matter was fully covered in the court's charge.

Numbers 20 and 22 were likewise fully covered in the charge.

Numbers 23, 24, 25, 26, and 31, related to questions of intent, two of them dealing with the mutilation of the defendant's records. All these, too, were embraced in the charge.

There was no error in denying numbers 27, 28, 32, 34, and 35. They were in substance improper requests to charge on the *facts*.

Number 30 was likewise properly refused. Under the court's charge the jury could not have been left in doubt as to the matter it embraces. Furthermore, the court on the trial instructed the jury as to the scope of the evidence pertaining to the shipments made to the Texas Company (332).

Numbers 33 and 36 were likewise properly refused. The jury was fully instructed concerning the shipping regulations of the Interstate Commerce Commission. One of these requests embraces irrelevant matter, and the other is a request to charge on the *facts*.

Inasmuch as the additional requests came too late—when the jury was ready to return its verdict—there is no need of discussing them. No exceptions were taken, and it is unnecessary to point out how objectionable they are from the standpoint of law.

CONCLUSION

From beginning to end—from the plea in abatement to the concluding arguments—the record presents one long series of objections and exceptions. No one can read it without being convinced that this procedure was deliberately chosen as the best possible means of defense.

We offer no criticism; but we insist the defendant's rights were scrupulously upheld.

JAMES M. BECK,
Solicitor General.

J. A. FOWLER,
Special Assistant to the Attorney General.

APRIL, 1925.

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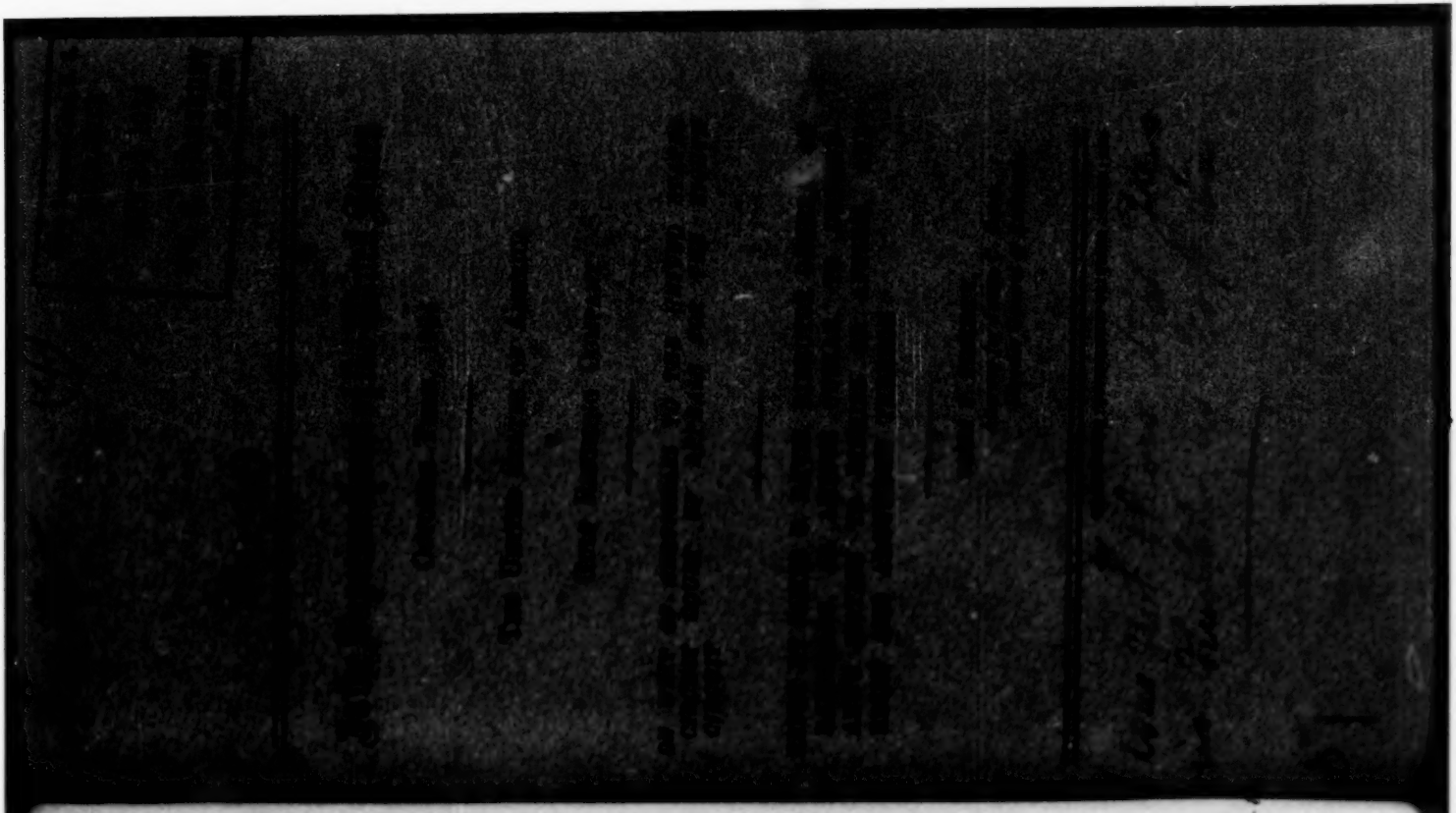

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18073—21†—1

TABLE OF CASES CITED

In the Supreme Court of the United States.

OCTOBER TERM, 1924

UNITED STATES OF AMERICA

v.

GULF REFINING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY TO DEFENDANT'S MOTION TO DISMISS OR AFFIRM, ASSIGNMENT OF ERRORS, AND BRIEF AND ARGUMENT IN BEHALF OF THE UNITED STATES

REASONS FOR FILING BRIEF AS AMICUS CURIAE

This brief is filed by the Director General of Railroads in support of the writ, because, as stated in the petition, therefore, the judgment of the Circuit Court of Appeals—

> Practically precludes the Government, through the Director General of Railroads, from collecting undercharges outstanding against the respondent in this respect, aggregating approximately $500,000.

and—

> Probably subjects the Government, through the Director General of Railroads, as Agent of the President, to liabilities for overcharges in this respect, aggregating $500,000.

Furthermore, this brief will be more particularly concerned with those questions of the force and effect of the administrative regulations of the Interstate Commerce Commission, and of the carriers' tariff provisions, arising out of, or incident to the first and second reasons assigned for the granting of the petition for certiorari in that petition, which are—

(1) That the judgment of the Circuit Court of Appeals practically nullifies the powers of the Government under the so-called "Transportation of Explosives Act" to enforce the regulations promulgated by the Interstate Commerce Commission for the safe transportation of explosives and other dangerous articles.

(2) "That said judgment practically nullifies the powers conferred upon the Interstate Commerce Commission under Sections 1, 6, 13, and 15 of the Act to Regulate Commerce, to prescribe just and reasonable rates and classifications, and just and reasonable regulations and practices affecting the manner in which tne property intended for transportation shall be marked and described."

By arrangement with the Solicitor General, these questions arising under the writ will be discussed in this brief rather than in the brief filed by him on behalf of the United States.

Principally, however, there will be presented to the court in this brief the primary contention of the Government; that is, that the Circuit Court of Appeals erred in ignoring the binding effect of the carriers' published tariff provisions requiring the shipments embraced by the

indictment to be described as "gasoline" for transportation purposes, irrespective of what might be their proper description chemically, or for commercial purposes.

Incidentally, it will be shown that there was abundant evidence in the testimony of the Government's experts and in the admissions of the defendant's witnesses that for chemical, and for commerical purposes as well, the shipments covered by the indictment were gasoline.

On the other hand, this brief will not discuss the strictly jurisdictional questions raised by the motion to dismiss, these questions being fully covered by the brief filed by the Solicitor General.

STATEMENT OF THE CASE

Certiorari was granted to review the judgment of the Circuit Court of Appeals for the Eighth Circuit reversing and remanding for new trial a judgment of conviction on which a fine of $99,000 had been entered by the United States District Court for the Eastern District of Oklahoma on ninety-nine accounts, charging the respondent with receiving concessions and discriminations in rates on shipments of gasoline from Kiefer, Drumright, and Jenks, Oklahoma, to its refinery at Port Arthur, Texas, in violation of the Elkins Act of February 19, 1903, 32 Stat. 847, as amended June 29, 1906, 34 Stat. 587.

The shipments in question admittedly consisted of casing-head gasoline, a condensate of casing-head gas, shipped either "weathered," or blended with naphtha,

but had been billed to respondent by its subsidiary, the Gypsy Oil Company, as "unrefined naphtha," and respondent had paid only the lower charges applicable to that commodity, instead of the higher charges applicable to gasoline.

The case is before the court upon the respondent's motion to dismiss the writ of certiorari and to affirm the judgment of the Circuit Court of Appeals on the following grounds:

> (*a*) That this court is without jurisdiction to review by certiorari or otherwise, a judgment of the Circuit Court of Appeals in favor of a defendant in a criminal case, reversing a conviction in a District Court.
>
> (*b*) That even if this court has such jurisdiction in a proper case, it is not exercisable in this case, because the judgment of the Circuit Court of Appeals was a remand for a new trial, it being contended such judgment is not final within the meaning of Section 240 of the Judicial Code of 1911, 36 Stat. L. Chapter 231, page 1157.
>
> (*c*) Because it is contended that the questions raised on certiorari are frivolous.

As already stated, this brief will not discuss grounds "a" and "b" of the defendant's motion to dismiss, except such incidental reference to ground "b" as are necessary to explain the inadvertent representation to this court in the petition for certiorari that the judgment of the Circuit Court of Appeals was one of reversal without remand for a new trial.

The defendant's motion to dismiss calls attention to the fact that in the petition for the writ, it was

represented, at least by implication, that the judgment of the Circuit Court of Appeals remanded for dismissal instead of for a new trial. In the first paragraph of that petition the judgment of the Circuit Court of Appeals is referred to as

> reversing and remanding a judgment * * * entered by the United States District Court,

but in the fifth reason assigned for granting the petition, reference is made to

> the grounds upon which that court (the Circuit Court of Appeals) reversed *and remanded for dismissal.*

The respondent's assumption, stated at page 22 of the Argument, that this erroneous representation was

> doubtless inadvertently made in the absence of the mandate,

is correct. The circumstances of this inadvertent misrepresentation are too complicated to set out here, except to note that the opinion of the Circuit Court of Appeals itself reads "reversed and remanded." (Rec. 1692.) The petitioner's good faith not being questioned, it is, therefore, merely necessary to consider whether this court has jurisdiction to review a judgment of the Circuit Court of Appeals reversing and remanding for a new trial a conviction in a criminal case, and, if such jurisdiction exists, whether it should be exercised here.

It is submitted that such jurisdiction exists and should be exercised in this case. It will be demonstrated moreover, that none of the alleged errors

pointed out by the Circuit Court of Appeals constitute reversible error.

Even should this court, however, agree with the Circuit Court of Appeals that certain remarks by petitioner's counsel to the jury, and the admission of certain tstimony, constituted reversible error, this court should still reform or set aside that portion of the opinion of the Circuit Court of Appeals by which that court undertakes to reverse, as without support in the evidence, the finding of the jury that the shipments were, in fact, gasoline, as charged in the indictment. That is, this court, should, in any event reverse the judgment of the Circuit Court of Appeals since it clearly appears that this portion of the opinion of the Circuit Court of Appeals, and not the other alleged errors pointed out by that Court, is the basis upon which it reversed the judgment of the District Court and the verdict of the jury. This is shown by the statement in the opinion of the Circuit Court of Appeals (Rec. 1691) that—

> many errors are assigned to the admission and rejection of evidence, to the instructions of the court, to the refusal of request to instruct, and to comments by the court during the progress of the trial, which it is claimed were prejudicial and unfair, *but the view we take of the case renders it unnecessary to pass on them.*
>
> It is our opinion that when all competent and relevant proof in the case is given a fair and impartial consideration the conclusion that the verdict is without support, is inevitable.

To proceed, therefore, to a new trial upon the basis of the opinion and judgment of the Circuit Court of Appeals as it now stands, must result in further mistrial of this case for the following reasons:

1. The Circuit Court of Appeals has clearly and unmistakably erred in holding that there was no evidence to support the jury's finding that the shipments were gasoline, as charged in the indictments, and such holding results from the arbitrary disregard by the Circuit Court of Appeals itself of competent and relevant evidence.

2. While the evidence before the court and jury was conflicting as to whether the shipments were gasoline or "unrefined naphtha," there was at least substantial evidence for the government that the shipments were gasoline. The nature of this evidence is briefly set out in the footnote.

NOTE.—1. The defendant's admission, and independent proof, that all of the shipments from Kiefer and Drumright consisted of casinghead gasoline, a condensate of casinghead gas, blended with painter's or similar naphtha to reduce the vapor pressure to a ten-pound maximum (R. 179, 180, 549), and that all the shipments from Jenks consisted of straight casinghead gasoline, unblended with anything, but reduced by weathering to a maximum vapor pressure of ten pounds (Rec. 179, 180, 207, 554).

2. The defendant's admission that such blending and weathering had been done to bring the shipments within the maximum vapor pressure allowed by the Interstate Commerce Commission's Transportation Regulations for the Transportation of Dangerous Articles, and by the carrier's tariffs. (Rec. 679.)

3. Proof that the carrier's published tariffs required that "condensates of cashinghead gas when reduced to a maximum vapor pressure of ten pounds per square inch and shipped either alone or blended with other petroleum products, be shipped and described as gasoline, casinghead gasoline or casinghead naphtha," and that such tariffs further required the shippers to certify that the shipments were "properly described by name * * * according to the regulations

3. That there being substantial evidence before the court below, and the jury having found by its verdict, under appropriate instructions, that the petitioner had proved these shipments to be gasoline beyond a reasonable doubt, the Circuit Court of Appeals could not set aside such finding of fact by the jury merely because it differed with the jury as to the preponderance of the evidence in this respect, or as to the conclusions to be drawn from such evidence, or even though it beleived such evidence did not prove such shipments gasoline beyond a reasonable doubt.

4. To permit a new trial in conformance with the opinion and judgment of the Circuit Court of Appeals would necessarily result in further mistrial because the trial court under that judgment and opinion, would be required to disregard arbitrarily, as the Circuit Court of Appeals has done, the require-

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prescribed by the Interstate Commerce Commission." (Rec. 436, 1159.)

4. Proof that the Interstate Commerce Commission's Regulations for the Transportation of Dangerous Articles made similar requirements. (Rec. 1216, 1270.)

5. Proof that the defendant's subsidiary certified on the bills of lading that the shipments were "properly described by name * * * according to the regulations prescribed by the Interstate Commerce Commission." (Rec. 953, 959, 961, 963, 966.)

6. Proof, and the defendant's admission, that prior to December 2, 1916, all such shipments were billed and described by its subsidiary as gasoline (Rec. 188, 189, 208, 209) and that defendant paid the gasoline charges applicable thereto (Rec. 281).

7. Proof, and the defendant's admission that on and after December 2, 1916, when rates on "unrefined naphtha" were first published, defendant's subsidiary, without making any change whatever in the nature of its shipments (Rec. 480, 550), and by defendant's instructions, shipped and described such condensates as "unrefined naphtha," and defendants paid only the lower rate applicable to that commodity (Rec. 280).

8. Proof, and the defendant's admission, that both prior and subsequent to December 2, 1916, all other shippers shipped and described

ments of the carrier's published tariffs that the shipments be shipped and described as "gasoline"; the similar requirements of the Interstate Commerce Commission's Regulations Transportation of Dangerous Articles; the testimony of the petitioner's expert witnesses that the shipments were gasoline, as well as the defendant's admissions referred to in the foregoing footnote.

5. To permit either the Circuit Court of Appeals or the trial court on new trial to disregard the positive requirements of the carrier's published tariffs, and of the Commission's Regulations for the Transportation of Dangerous Articles, that these shipments be shipped and described as gasoline, would be to vitiate and nullify the powers conferred on the Interstate Commcere Commission by Sections 1, 6, 13, and 15 of the Interstate Commerce Act, and practically to nullify the powers of the government under the so-called Trans-

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similar shipments as gasoline (Rec. 427, 428), and that defendant's subsidiary itself continued to use this description in shipping similar shipments to other points (Rec. 214, 215, 479, 480, 486, 487).

9. Admissions by the defendant that the word "gasoline" had been erased from certain book records of such shipments subsequent to inspection by an examiner of the Interstate Commerce Commission, and prior to the production of the books before the grand jury, and subsequent admission that the erasures had been made by employees of the defendant. (Rec. 507, 511, 512.)

10. Proof that headings of certain of defendant's lists of these shipments had been cut off, but that letters written by defendant's Port Arthur office to defendant's Pittsburgh office referred to these same shipments as Kiefer "gasoline." (Exhibits 80, 81, Rec. 1354–1358; also Rec. 521–533.)

11. Testimony of expert witnesses for the government that such shipments were gasoline. (Rec. 822–842; 852–878; 878–892.)

12. Admissions of defendant's expert witnesses that such shipments were popularly known as gasoline. (Rec. 694.)

13. Letters of defendant's traffic manager Ellis describing such shipments as "gasoline" in asking reduction of rates thereon. (Rec. 1293, 1294, 1363, 1364, 1365, 1366, 1367, 1376, 1377.)

portation of Explosives Act, Criminal Code Section 233–236, 35 Stat. L. 1134, to enforce the regulations promulgated by the Interstate Commerce Commission for the safe transportation of Explosives and other dangerous articles.

Before discussing the issues raised by the defendant's motion to dismiss and affirm, the petitioner believes it will be helpful to the court to make a brief statement of the facts.

Defendant and the Gypsy Oil Company are both subsidiaries of the Gulf Oil Corporation, but for convenience the Gypsy Oil Company is herein referred to as defendant's subsidiary. The Gypsy Oil Company produced casing-head gasoline, a condensate from casing-head (petroleum) natural gas at its compression plants at Kiefer, Drumright, and Jenks, Okla. It is important that the court keep in mind that all of the shipments covered by the indictment were *southbound* shipments of this casing-head gasoline, either straight or blended with naphtha, and that the indictments are in no way concerned with the *northbound* shipments of the naphtha used for such blending. All of the shipments from Jenks, Okla., were *southbound* shipments of straight casing-head gasoline *unblended with anything else whatever*, the vapor tension of which had been reduced by weathering to a maximum of ten pounds in order to comply with the requirements of the carrier's tariffs, and of the Transportation of Explosives Regulations of the Interstate Commerce Commission, already referred to in the foregoing footnote. All of the shipments from Kiefer and Drumright were *southbound* shipments of casing-

head gasoline blended with naphtha to similarly reduce their vapor tension to a maximum of ten pounds. The blend was about 65 per cent casing-head gasoline and 35 per cent naphtha. By a reference to the foregoing footnote it will be seen that the carrier's tariffs and the Commission's Transportation of Dangerous Articles regulations required that—

> Condensates of casing-head gas when reduced to a maximum vapor pressure of ten pounds per square inch and shipped either alone or blended with other petroleum products, be shipped and described as gasoline, casing-head gasoline, or casing-head naphtha.

That footnote further shows that the defendant's subsidiary certified on its bills of lading that the shipments were

> properly described by name * * * according to the regulations prescribed by the Interstate Commerce Commission.

The naphtha used for this blending at Kiefer and Drumright consisted of painter's or other heavy naphtha shipped by the defendant *northbound* from its refinery at Port Arthur to its subsidiary's compression plants at Kiefer and Drumright. The blending of painter's or other heavy naphtha with the more volatile casing-head condensate, reduced the vapor tension of the latter to the required maximum of ten pounds.

The indictments are in no way concerned with these *northbound* shipments of naphtha. The indict-

ments are for describing the *southbound* shipments of straight casing-head gasoline, or casing-head gasoline blended with this naphtha as "unrefined naphtha" instead of as "gasoline," as required by the carrier's tariffs and the Transportation of Dangerous Articles regulations of the Interstate Commerce Commission.

Defendant admits that prior to December 2, 1916, all of the *southbound* shipments by its subsidiary to it of casing-head gasoline weathered or blended, were billed and described in its subsidiary's bills of lading as "gasoline," and that the defendant paid the charges applicable to gasoline. On December 2, 1916, however, there became effective in the carrier's tariffs lower rates applicable to a commodity therein designated as "unrefined naphtha." The rate from Kiefer, for instance, on gasoline was 33 cents per 100 pounds and the rate on unrefined naphtha was 19½ cents. The rates from Drumright and Jenks on gasoline and unrefined naphtha, respectively, bore substantially the same relationship. The circumstances attending the publication of these lower rates on "unrefined naphtha" will be briefly referred to. First, however, the court should note that the defendant unqualifiedly admits that, without any change whatever in the character of the shipments, the defendant's traffic manager, who was also traffic manager of its subsidiary, the Gypsy Oil Company, ordered the Gypsy Oil Company thereafter to ship and describe such shipments as "unrefined naphtha"; that the Gypsy Oil Company accordingly so changed its shipping orders and descriptions for such shipments

from "gasoline" to "unrefined naphtha," though continuing to certify that they were

> properly described by name * * * according to the regulations prescribed by the Interstate Commerce Commission,

and that the defendant thereupon paid only the lower rates applicable to unrefined naphtha instead of the higher rates applicable to gasoline. The defendant further admits that all other shippers both before and after December 2, 1916, shipped and described similar shipments between the same points, and between other points, as "gasoline." It contends, however, that this admission is irrelevant because neither the defendant's knowledge of, nor any connection with such shipments by other producers of casinghead gasoline was shown.

The record further contains letters from one Ellis, Traffic Manager of the defendant written during the two years preceding December 2, 1916, during which he was attempting to obtain a reduction on the northbound rates on *naphtha* to Kiefer and Drumright, and a reduction in the southbound rates on the *gasoline* from Kiefer and Drumright. These letters will be further discussed. It will then be noted that Mr. Ellis specifically describes the *southbound* shipments as "gasoline," and describes as "naphtha" only the *northbound* shipments of naphtha used for blending with the southbound gasoline. It will also be noted that after the carriers had refused to reduce even the northbound rates because involving a reduction *on a refined product*, Ellis, in order to persuade them to

make such a reduction, represents that there will be two *southbound* shipments of "*gasoline*" for each *northbound* shipment of "naphtha." It further appears that the rate on "unrefined naphtha" was finally published on a request from Ellis for a rate under such designation, but that the carrier's traffic men responsible for the publication of the rate, testified that they did not know to what character of shipments Ellis intended to apply the rate, assuming that any shipments made would come within that description.

This brief statement of facts is merely for the preliminary information of the court, and it will be necessary to consider the evidence in some detail in demonstrating the error of the Circuit Court of Appeals in holding that the verdict of the jury was without support in the evidence.

I

There was at least substantial evidence to support the jury's verdict that the shipments were gasoline, as charged in the indictment, and were not unrefined naphtha, as billed by the shipper. The evidence was, in fact, conclusive in this respect.

The Director-General desires to make clear at the outset that, for the purposes of this writ, it is not necessary to demonstrate to this court that the evidence before the jury established conclusively and beyond reasonable doubt that the shipments consisted of gasoline, as charged in the indictment, and not of unrefined naphtha, as billed by the shipper, under the directions of the defendant. The Director General submits that the error of the Circuit Court

of Appeals will be established if it is shown that there was substantial evidence to this effect before the jury. If there was such substantial evidence neither the Circuit Court of Appeals nor this court could, under the law, disregard and set aside the jury's finding that the shipments consisted of gasoline, as charged, even though the Circuit Court of Appeals or this court should differ with the jury as to the preponderance of the evidence, or the conclusions to be drawn therefrom, or as to whether the evidence established such fact beyond a reasonable doubt.

As the Director General understands the law, the verdict of the jury in this case that the shipments were gasoline, found under appropriate instructions by the court that—

> unless you find from the evidence beyond a reasonable doubt that the commodity so shipped and so received by the defendant was gasoline, it is your duty to find the defendant not guilty (Rec. 917)—

could not be set aside by an appellate court unless the court would be warranted in saying that as a matter of law the evidence before the jury *could not* establish such fact. The Director General understands that while the trial court may instruct a verdict for the defendant at the close of the government's case, or at the close of all the testimony, if the evidence before the jury could not, as a matter of law, support a verdict of guilty, an appellate court can not *after* submission of the question to the jury under appropriate instructions, set aside the jury's verdict merely

because there was a conflict in the evidence, and because the appellate court might differ with the jury as to the conclusions to be drawn from the evidence. (Encyclopedia, U. S. Supreme Court Citations, vol. 11, p. 935; *Sparf & Hansen* v. *U. S.*, 156 U. S. 51, 99–100.)

A consideration of the evidence, however, before the jury will demonstrate in this case that *the jury was justified beyond a reasonable doubt* in finding that the shipments consisted of gasoline. It will further demonstrate that the conclusion of the Circuit Court of Appeals to the contrary resulted from an arbitrary disregard of competent evidence under a misapprehension of the law, and from a misconception of the true significance of much of the defendant's evidence which the Circuit Court of Appeals considered required an opposite conclusion to that reached by the jury.

The substantial and, indeed, conclusive nature of the evidence before the jury upon which it found that the shipments consisted of gasoline as charged has already been outlined in the footnote on page 7. It will conduce to the convenience of the court to discuss the evidence substantially under the headings indicated in that footnote.

(a) **THE EVIDENCE SHOWS THAT THE CARRIER'S PUBLISHED TARIFFS REQUIRED THAT CONDENSATES OF CASINGHEAD GAS, WHEN REDUCED TO A MAXIMUM OF TEN POUNDS PER SQUARE INCH AND SHIPPED EITHER ALONE OR BLENDED WITH OTHER PETROLEUM PRODUCTS, BE SHIPPED AND DESCRIBED**

AS GASOLINE, CASINGHEAD GASOLINE, OR CASINGHEAD NAPHTHA, AND FURTHER REQUIRED THAT THE SHIPPER CERTIFY THE SHIPMENTS TO BE "PROPERLY DESCRIBED BY NAME * * * ACCORDING TO THE REGULATIONS PRESCRIBED BY THE INTERSTATE COMMERCE COMMISSION."

THE EVIDENCE FURTHER SHOWS THAT DEFENDANT'S SUBSIDIARY UNDER DEFENDANT'S INSTRUCTIONS SO CERTIFIED ON ITS BILLS OF LADING.

THE INTERSTATE COMMERCE COMMISSION'S "REGULATIONS FOR THE TRANSPORTATION OF DANGEROUS ARTICLES OTHER THAN EXPLOSIVES BY FREIGHT" MADE SIMILAR REQUIREMENTS.

The outstanding feature of the opinion of the Circuit Court of Appeals is, as was noted in the petition under which this court granted the writ of certiorari, the failure of the Circuit Court of Appeals even to mention these requirements of the carrier's tariffs and of the Commission's regulations. This is the more remarkable since not only was there abundant and independent proof, but the defendant admitted, that all of the southbound shipments from Jenks consisted of casinghead gasoline unblended with anything whatever (Rec. 179, 180, 207, 554), while there was like proof and like admissions that its shipments from Kiefer and Drumright consisted of casinghead gasoline blended with painter's naphtha (179, 180, 549). Without making any question of these facts, the record shows that the defendant simply contended that it was justified in describing such shipments of casinghead gasoline, blended or unblended, as "unrefined naptha."

Supplement 5 to Western Classification No. 55,[1] effective August 29, 1918, provided as follows:

> (*k*) Liquid condensates from natural gas of oil wells, made either by the compression or absorption process, alone or blended with other petroleum products, must be described as liquified petroleum gas when the vapor pressure at 100 degrees F. (90 degrees F., Nov. 1st to March 1st) exceeds ten pounds per square inch.
>
> *When the liquid condensate, alone or blended with other petroleum products, has a vapor pressure not exceeding ten pounds per square inch, it must be described and shipped as gasoline, casinghead gasoline or casinghead naptha.* [Italics ours.]
>
> * * * * *
>
> *When the liquid condensate, alone or blended with other petroleum products, has a vapor pressure not exceeding ten pounds per square inch, it must be described as gasoline, casinghead gasoline, or casinghead naptha,* and must be shipped in metal drums or barrels complying with Specification No. 5; or in ordinary tank cars, sixty pounds test class, equipped with mechanical arrangements for closing of dome covers, as specified in Masyer Car Builders' specifications for tank cars.

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[1] The carrier's tariffs under which the shipments embraced by the indictment moved were all subject to the Western Classification. See, for instance, Southwestern Lines Tariff No. 26 T, Supplement 52 (Rec. 1038), effective November 16, 1916, which provides:

"Governed except as otherwise provided herein by Western Classification No. 54 * * * or reissues thereof."

Also Supplement No. 53 to the same tariff (Transcript 1041), making similar provision. The prior and subsequent issues and supplements of these tariffs in the record are too numerous to give all record references. However, all the applicable tariffs contained this provision.

Both Western Classification No. 55, as well as Western Classification No. 54, and its supplements, contain in addition, the following provisions:

GENERAL RULES

"1711. Carriers that are subject to the Act to Regulate Commerce *must not receive* shipments of articles defined as dangerous by these regulations, when the shipments are not packed, marked, labeled, *described*, and certified as prescribed herein.

* * * * *

NOTE.—Rule 44 of Western Classification No. 54 and its supplements, which was effective during the prior period of the indictment, carried substantially the same rule, which, however, read as follows (Rec. 1079):

"(*k*) Liquid condensate from natural gas or from casinghead gas of petroleum oil wells whose vapor tension at 100 degrees F. (90 degrees F., Nov. 1 to March 1st) exceeds ten pounds per square inch, must be described as liquefied petroleum gas.

* * * * *

"When the condensate, blended or unblended, with other products has a vapor tension as above defined, not exceeding ten pounds per square inch, and is shipped as 'gasoline' in an ordinary tank car, sixty pounds test class, defined in Master Car Builders' Association specifications for tank case, the safety valves of such a car must be set to operate at twenty-five pounds per square inch, with a tolerance of one pound above or below, etc."

Western Classification No. 54 and its supplements also contain the following provision under the heading:

List of principal dangerous articles

Names of dangerous articles.	References for packing requirements, paragraph numbers, remarks for information, and rules for exceptions of similar articles.
* * *	* * * * *
Gasoline (see Note 1).	Pars. 1807 (c), 1822, 1824 to 1827. Gasoline made by compressing natural gas or by blending liquefied petroleum gas with refinery gasoline or naphtha may be described and shipped as gasoline, provided the vapor pressure does not exceed 10 pounds per square inch.

The above provision was also carried in Supplement 5 to Western Classification 55, and subsequent supplements. (Rec. 1150, 1151.)

"1712. All shipments of articles subject to these regulations offered for transportation in interstate commerce, must be properly described by the shipper in his shipping order and bill of lading, under the specific or general name provided for the description of such freight by the carrier's classification and tariff governing.

"The same description of contents must be plainly marked on the outside of each package." (Western Classification No. 55, Rec. 1143; Western Classification No. 54, Rec. 1066.)

LIST OF PRINCIPAL DANGEROUS ARTICLES

(*d*) A shipment described under a definite and proper name not in the following list and on a shipping order with no notation as to labels applied and no shipper's certificate, will be assumed by the carrier in the absence of knowledge to the contrary, to be not dangerous under these regulations.

(NOTE.—The name "unrefined naphtha" does not appear in the list referred to.) (Western Classification No. 55, Sup. 5, Rec. 1147; Western Classificatin No. 54, Rec. 1069.)

All of these provisions were tariff publications of the provisions of the Interstate Commerce Commission's "Regulations for Transportation of Dangerous Articles other than Explosives by Freight," originally effective October 1, 1914 (Rec. 1216 to 1240) and the amended regulations (Rec. 1241 to 1270).

It was admitted, as well as independently proved, as already noted, that the shipments from Kiefer, Drumright, and Jenks consisted of—

> Liquid condensates from natural gas of oil wells made * * * by the compression * * * process * * * alone or blended with other petroleum products (having) a pressure not exceeding ten pounds per square inch. (Rec. 179, 180, 207, 554, 549.)

In other words, the shipments came precisely within the provisions of the Western Classification, requiring that such shipments—

> must be described and shipped as gasoline, casinghead gasoline, or casinghead naphtha.

Under the further requirements of the Western Classification already noted that—

> all shipments of articles subject to these regulations offered for transportation in interstate commerce, must be properly described by the shipper in the shipping order and bill of lading, under the specific or general name provided for the description of such freight by the tariff classification and tariff governing—

the only description by which they could be so shipped was "gasoline," as the carrier's tariffs contain no specific rates on casinghead gasoline or casinghead naptha. Equally, of course, billing such shipments as "unrefined naptha" was a clear violation of the Western Classification.

The binding effect of such tariff provisions upon shipper and carrier alike is so clearly established in this court as hardly to necessitate citation. (*International Coal* case, 230 U. S. 184, page 197; *Erie Railroad Co.* v. *Stone*, 244 U. S. 322, pages 335-336;

Davis v. *Henderson*, United States Supreme Court, decided October 27, 1924.)

That to permit the Circuit Court of Appeals to ignore completely, as it has done, these binding tariff provisions must result in vitiating not only the most important provisions of the Interstate Commerce Act, but must, as well, practically nullify the powers of the government under the Transportation of Explosives Act, will subsequently be shown. What it is desired here to point out is that such tariff provisions, and such transportation regulations by the Interstate Commerce Commission, constituted at least some substantial evidence that these shipments were for transportation purposes, and within the meaning of the carrier's tariffs, "gasoline," and could not be "unrefined naptha." What will be further elaborated is that the conclusion of the Circuit Court of Appeals to the contrary is due not only to the ignoring of these tariff provisions and transportation regulations, but to its failure to appreciate that the question before the jury was not what these shipments might be in a technical, chemical sense, but what they were within the meaning of the tariffs for rate purposes.

It should perhaps be noted that the phraseology of paragraph (k) of Rule 44 to Western Classification No. 54 and of its supplements, was not so definite as Supplement 5 to Western Classification No. 55 in requiring that liquid condensates, blended or unblended, when reduced to a vapor pressure not to exceed ten pounds

> *be* described as gasoline, casinghead gasoline or casinghead naphtha,"

which was the specific wording of Supplement 5.

As shown by the footnote on page 19, paragraph (k) of Rule 44, Western Classification No. 54 and its supplements provided:

> When the condensate blended or unblended with other products has a vapor tension as above defined not exceeding ten pounds per square inch, and *is shipped as gasoline* in an ordinary tank car * * * the safety valves of such cars must be set, etc.

However, as shown by the same footnote, Western Classification No. 54 and its supplements, as well as Supplement 5 to Western Classification No. 55, all carried the following provision as well:

List of principal dangerous articles

Names of dangerous articles.	References for packing requirements, paragraph numbers, remarks for information, and rules for exceptions of similar articles.
* * *	* * * *
Gasoline (see Note 1)---	Pars. 1807 (c), 1822, 1824 to 1827. Gasoline made by compressing natural gas or by blending liquefied petroleum gas with refinery gasoline or naphtha *may be described and shipped as gasoline*, provided the vapor pressure does not exceed 10 pounds per square inch.

There was some suggestion by defendant's counsel on trial that the use of the word "may" in this latter provision, instead of "must" was permissive, and did not require such shipments to be described as gasoline. (Rec. 433, 434.) The court, however, considered the provisions as obviously mandatory

(Rec. 434), since intimately connected with safety of transportation.

The court's view is corroborated by General Rule 1711, already quoted and contained in Western Classification No. 54, as well as Western Classification No. 55, that—

> Carriers * * * *must not receive shipments of articles* defined as dangerous by these regulations when shipments are not packed, marked, labeled, *described*, and certified as prescribed herein.

Clearly, therefore, the provisions that "gasoline" made by compressing natural gas, or by blending liquefied petroleum gas with refinery gasoline or naphtha, *may* be described and shipped as gasoline is mandatory, since otherwise, under the rules in question, it could not be shipped at all.

Furthermore, the defendant's Vice President Tabor admitted (Rec. 679) that the weathering of the shipments of casinghead gasoline from Jenks, and the blending of shipments of casinghead gasoline from Kiefer and Drumright, was to conform to these regulations.

Any contention, therefore, by the defendant that it could, by the simple device of shipping and describing such condensates, blended or unblended, as "unrefined naphtha" instead of as gasoline, escape the whole intent and purpose of the Western Classification provisions, and of the Commission's Regulations for the Transportation of Dangerous Articles, hardly deserves serious consideration.

In any event, the Circuit Court of Appeals itself made no attempt to distinguish in this respect between shipments in the indictment prior to the effective date of the more specific language of Supplement 5 to Western Classification No. 55, and shipments on and after that date.

The Director General therefore submits that the provisions of the Western Classification, the similar provisions of the Commission's Regulations for the Transportation of Dangerous Articles, and the admitted conduct of the defendant itself in connection with such tariff provisions and such transportation regulations, alone furnishes practically conclusive evidence that the commodity shipped by the defendant was "gasoline," as found by the jury.

(b) THE EVIDENCE SHOWED, AND THE DEFENDANT ADMITTED, THAT PRIOR TO DECEMBER 2, 1916, EXACTLY SIMILAR SHIPMENTS TO THOSE COVERED BY THE INDICTMENT WERE BILLED TO IT BY ITS SUBSIDIARY DESCRIBED AS "GASOLINE," AND THAT DEFENDANT PAID THE GASOLINE CHARGES APPLICABLE THERETO, BUT THAT ON AND AFTER DECEMBER 2, 1916, THE DEFENDANT'S SUBSIDIARY, WITHOUT MAKING ANY CHANGE WHATEVER IN THE NATURE OF ITS SHIPMENTS, SHIPPED AND DESCRIBED THEM AS "UNREFINED NAPHTHA," AND DEFENDANT PAID ONLY THE LOWER RATE APPLICABLE TO THAT COMMODITY.

As has been seen under the foregoing subheading, the defendant admitted that its southbound shipments of casinghead gasoline from Kiefer and Drumright to Port Arthur were blended with naphtha, and that its southbound shipments from Jenks of casinghead gasoline, unblended, were "weathered," in order to bring them within the Interstate Com-

merce Commission's transportation requirement of a maximum vapor pressure of 10 pounds, in which case the Transportation Regulations, as well as the tariff requirements of the carrier's Western Classification, required them to be shipped and described as gasoline, casinghead gasoline, or casinghead naphtha.

It has furthermore been seen that the defendant certified that all these shipments were described as required by the Interstate Commerce Commission's regulations. Nevertheless, the defendant admits that prior to December 2, 1916, exactly similar shipments to those covered by the indictment were billed and described by its subsidiary as "gasoline" (Rec. 188, 189, 208, 209), and that the defendant paid the gasoline charges applicable thereto. (Rec. 281.) It further admits that on and after December 2, 1916, when rates on unrefined naphtha were first published, the defendant's subsidiary, *without making any change whatever in the nature of its shipments* (Rec. 480–550), shipped and described its shipments as "unrefined naphtha," and the defendant paid only the lower rate applicable to that commodity. (Rec. 280.)

It further appears that one Donovan was general superintendent of the gasoline department of both the Gulf Refining Company and the Gypsy Oil Company, and that he reported to Mr. Tabor, who was Vice President of the Gulf Company, and that Mr. Ellis was Traffic Manager for both Companies. (Rec. 246, 248.) Moreover, it was admitted Mr. Ellis, as Traffic Manager of the Gulf Company, in-

structed Donovan how to ship the product in question. (Rec. 484.)

The defendant attempts to explain this change in description and to mitigate its force as an admission as to the real character of the shipments, by contending that prior to December 2, 1916, there was no rate on "unrefined naphtha" from Kiefer, Drumright, or Jenks to Port Arthur. It has already been seen, however, that the defendant's subsidiary, both prior to December 2, 1916, and subsequent to that date, certified that its shipments were—

> properly described by name * * * according to the regulations prescribed by the Interstate Commerce Commission,

and there is no pretense that there was any difference in the requirements in this respect of the Western Classification, or of the Commission's transportation regulations prior and subsequent to December 2, 1916, at least until the effective date of Supplement 5 to Western Classification No. 55, August 29, 1918. Yet it has been seen that the change in the description of the defendant's shipments was not coincident with the change in the Western Classification in August, 1918, but with the publication by the carriers in December, 1916, of a lower rate from Kiefer, Drumright, and Jenks to Port Arthur on a commodity designated as "unrefined naphtha" than applied between the same points on "gasoline."

It is the circumstances, however, in connection with this very publication of a rate on a commodity designated as "unrefined naphtha" from Kiefer, Drum-

right, and Jenks to Port Arthur, which furnish a conclusive answer to the defendant's attempt to mitigate the force of the admission involved in their prior designation of their shipments as "gasoline." These circumstances are shown in certain letters passing between the defendant's traffic manager Ellis and the carrier's officials responsible for the final publication of a rate on a commodity designated as "unrefined naphtha," together with the testimony of certain of the officials themselves, which will subsequently be discussed in greater detail. It will suffice to say here that Ellis' original request was for a reduction in the rate on "gasoline" from Kiefer, Drumright and Jenks *southbound*, and for a reduction on the rate on "naphtha" *northbound* only, and that the testimony of the traffic officials shows that when a rate on a commodity designated as "unrefined naphtha" from Kiefer, Drumright, and Jenks to Port Arthur was published, the traffic officials themselves did not know to exactly what commodity the defendant intended to apply the rate, or to what commodity the defendant, in fact, applied it. (Rec. 571, 573 to 576.)

(c) **THE EVIDENCE SHOWED THAT BOTH PRIOR AND SUBSEQUENT TO DECEMBER 2, 1916, ALL OTHER SHIPPERS SHIPPED AND DESCRIBED SIMILAR SHIPMENTS AS GASOLINE BETWEEN THESE SAME POINTS AND OTHER POINTS AS WELL, AND THAT THE DEFENDANT'S SUBSIDIARY ITSELF, EVEN AFTER THAT DATE, CONTINUED TO USE THIS DESCRIPTION IN SHIPPING SIMILAR SHIPMENTS TO OTHER POINTS.**

After one League, an inspector of the Bureau of Explosives, had testified (Rec. 409) that he had inspected practically all casinghead gasoline compression plants throughout the country, including

Oklahoma, Wyoming, Pennsylvania, West Virginia, Illinois, and Ohio, and after general testimony that all these plants shipped and described casinghead gasoline, blended or weathered, to a maximum vapor pressure of ten pounds, as gasoline, and after starting to enumerate all such plants that he had inspected in Oklahoma, he was stopped by Mr. Swacker, of counsel for the defendant, with the statement that the defendant would admit that League would testify that all other shippers shipped and described such shipments as gasoline. (Rec. 427.) Mr. Swacker, however, objected to the relevancy of the testimony and of the admission on the ground that, so far as the defendant was concerned, it was hearsay evidence and could not be used as an admission against it of the character of the shipments. The admission of this evidence is one of the alleged errors which the opinion of the Circuit Court of Appeals states (Rec. 1691):

> would require a reversal,

but none of which it appears were the actual basis of reversal, since, as has been noted, the Circuit Court of Appeals actually reversed solely on the ground that the evidence did not support the jury's finding that the shipments consisted of gasoline.

It is desired to point out, however, that even assuming that it would have been error to have admitted this testimony as an admission against the defendant of the character of the shipments, it was admissable as evidence of the general transportation and trade designation of the commodity.

Moreover, the Circuit Court of Appeals is in error in stating in the same portion of its opinion, that this evidence was admitted

> without a showing that they (shipments of other manufacturers) were substantially similar to those of the Gypsy Company. (Rec. 1691.)

A reference to League's testimony, particularly at pages 447 to 451, will show that League testified that

> the commodity shipped by the Gypsy was practically of the same character as that shipped by other people,

and is so quoted by defendant's counsel himself. It is true that by the skillful, misleading questions of defendants counsel (Rec. 447 et. seq.) the witness was led into saying that there "might have been" a variation in the amount of blending material. He testified, however, unequivocally (Rec. 448) that he never heard anyone except the Gulf Refining Company and its employees refer to such blended shipments as "unrefined naphtha," but that they were invariably called by everyone else "gasoline," and (Rec. 450 and 451) that he had never seen this blended commodity described in any billing and shipping orders to any other refinery than that of the defendant, as "unrefined naphtha."

Furthermore, the Circuit Court of Appeals misconceived the true significance of League's testimony that the blend of certain other shippers who shipped and described the blended commodity as "gasoline," contained as much as 75 per cent naphtha. The Circuit Court of Appeals says (Rec. 1691):

> that testimony was admitted * * * in the face of proof that they were not of uniform blend with those of the Gypsy Company, but contained, in one instance, as much as 75 per cent naphtha.

The only even plausible theory upon which the defendant itself can justify describing its shipments as "unrefined naphtha," is because of the blending of the casinghead gasoline with the heavy naphtha shipped north from Port Arthur for that purpose, the defendant's contention being that such naphtha used for blending was not refined naphtha, but crude, heavy or painter's naphtha. Of course, on this theory, the more naphtha in the blend, the more plausible becomes the defendant's excuse for calling the blend "unrefined naphtha." Therefore, League's evidence that the blended commodity of other shippers, even where the proportion ran to 75 per cent, was still invariably called "gasoline," only makes League's testimony the stronger against the defendant.

(d) **THE EVIDENCE SHOWED ADMISSIONS BY THE DEFENDANT THAT THE WORD "GASOLINE" HAD BEEN ERASED FROM CERTAIN BOOK RECORDS OF THE SHIPMENTS EMBRACED BY THE INDICTMENT SUBSEQUENT TO INSPECTION BY AN EXAMINER OF THE INTERSTATE COMMERCE COMMISSION, AND PRIOR TO THE PRODUCTION OF THE BOOKS BEFORE THE GRAND JURY, AND A SUBSEQUENT ADMISSION BY THE DEFENDANT THAT THE ERASURES HAD BEEN MADE BY AN EMPLOYEE OF THE DEFENDANT.**

The Circuit Court of Appeals says in its opinion, Rec. 1682, 1683:

> It was shown, and the fact emphasized by the prosecution, that some of the Gulf Refining

> Company's records which showed the receipt of the commodity at Port Arthur in the early part of 1917, described it as "Kiefer Gasoline," and that the word gasoline in many instances had been erased, and that the books were in that condition when they were presented to the grand jury. It was not shown who kept the books, nor who made the erasures.

It is quite impossible to explain upon what basis the Circuit Court of Appeals felt warranted in stating, as shown above, that

> it was not shown who kept the books, nor who made the erasures.

The record shows, page 507, the following:

> Mr. DIGGS, of counsel for the defendant. The defendant will admit, at the time of the surrender of these books to the United States authorities at Muskogee, to be used before the grand jury, that these erasures appeared in them.
>
> Mr. PAYNE (of Counsel for the Government). Your honor, I ask leave to ask him (Stewart, Agent of the Interstate Commerce Commission, who had examined the books) a couple of more questions, and then put Mr. Gann on the stand.
>
> The COURT. No; they admitted that these erasures appeared on the books, and appeared there when the books were delivered into the possession of the Government, and came from their possession.
>
> Mr. DIGGS. That is all right.

The record then shows, pages 508 to 511, numerous places where such erasures had been made, and then on page 511, a further admission by Mr. Diggs, reading as follows:

> Mr. DIGGS. Before we proceed, I have a statement I would like to make to the court. I desire to state to the court that the erasure of the word gasoline in the items forming the word Kiefer gasoline in Government's Exhibit 77 and 78 first came to my knowledge before the book was surrendered to the United States authorities at Muskogee for the use before the grand jury. My attention was directed to the erasures and explanation given to me, the erasures were made contemporaneously with the entries, and for the purpose of making them speak the truth, and it was not until after the adjournment at noon to-day that we discovered that they were otherwise made and now for the first time we have information that leads us to believe *that these erasures were made by an employee of the Gulf Refining Company subsequent to the beginning of the investigation by the Government*, and we now make this statement so the court can be thoroughly informed of the actual conditions, *and also make it to be used as an admission in this case in so far as it may be pertinent subject to inquiry.*

The record then shows, page 511, that Mr. Chambers, who was also of counsel for the Government, objected to this admission being made before the jury in the middle of testimony from which the jury

most apparently must necessarily reach the very conclusion which the defendant offered to admit, Mr. Chambers' idea obviously being that the admission was made in the hope of avoiding the still more unfavorable effect on the jury of the Government's incontrovertible evidence of the facts. Mr. Diggs then stated:

> I am not offering it to the jury in the trial of this case, but I am offering it to the court, so the court will understand the condition.
>
> The COURT. I will exclude the statement at this time from the consideration of the jury.

The Government then introduced further testimony by the Witness Otey, a laboratory inspector of the Gulf Refining Company at Port Arthur, proving the handwriting of the entries to be those of one Koontz, another employee of the Gulf Refining Company, and proving innumerable erasures of the word "gasoline" following the word "Kiefer." (Rec. 512 to 521.)

The admission of defendant's counsel, and the independent testimony in this respect, speak for themselves, and further comment on this portion of the opinion of the Circuit Court of Appeals would appear superfluous.

(e) **THE EVIDENCE SHOWS THAT HEADINGS OF CERTAIN OF DEFENDANT'S RECORDS OF THE SHIPMENTS EMBRACED BY THE INDICTMENT HAD BEEN CUT OFF, BUT THAT LETTERS WRITTEN BY DEFENDANT'S PORT ARTHUR OFFICE TO DEFENDANT'S PITTSBURGH OFFICE REFERRED TO THESE SAME SHIPMENTS AS KIEFER "GASOLINE," AND THAT APPARENT DUPLICATES OF SUCH RECORDS ATTACHED TO SUCH LETTERS BORE HEADINGS READING "RECEIPTS OF KIEFER GASOLINE."**

In the same portion of the opinion of the Circuit Court of Appeals just commented upon, it is stated (Rec. 1683):

> It was also shown that the heading on a number of pages listing shipments of the commodity from Oklahoma to Pittsburgh, had been cut off, and that letters written to the Pittsburgh office in connection therewith, referred to some of the shipments as Kiefer gasoline. These erasures and changes were characterized as admissions and introduced as such.

It is difficult to tell from this statement whether the Circuit Court of Appeals considered the admission of the testimony referred to at page 1691 of the record, as one of the assignments that—

> are in our judgment meritorious * * * and would require a reversal. (Rec. 1691.)

If so, the Circuit Court of Appeals has stated no ground for such a holding, and it is submitted that there was abundant justification for permitting such evidence to go to the jury as evidence of the defendant's actual knowledge of the real character of their shipments covered by the indictment, and evidence of its attempt to conceal such knowledge. That part of the Government's Exhibit 80, which appears at Rec. 1330, was a sheet containing a list of cars showing "outages," etc., for the month of April, 1917. This sheet appears to have been made in duplicate, and the heading had been cut off of the copy as handed to the Government agent. In response to a subpœna *duces tecum*, the other copy was turned over to the

Government during the trial, and that copy is in evidence as Government Exhibit 81 and 82. (Rec. 1354 to 1358.) Exhibit 81 is a letter addressed to the defendant's auditor at Pittsburgh, and begins:

> Our April oil statement will show as a receipt, 146 cars of *gasoline* from Kiefer, etc.—

and Exhibit 82, which is the list attached to Exhibit 81, is apparently a duplicate of Exhibit 80, and is headed:

> "Receipts of Kiefer Gasoline, April 1917." (See testimony Interstate Commerce Inspector Stewart, Rec. 429 to 431.)

It is difficult to understand on what ground the Circuit Court of Appeals could have considered that these deliberate erasures and mutilations by defendants of records which it realized were compromising, and indeed damning, were not properly receivable as admissions against the defendant, and did not constitute some evidence at least, which would support the jury's finding that the shipments embraced by the indictment were actually gasoline, as therein charged.

(f) EVIDENCE OF EXPERT WITNESSES FOR THE GOVERNMENT THAT SHIPMENTS EMBRACED BY THE INDICTMENT WERE GASOLINE, AND ADMISSIONS OF DEFENDANT'S EXPERT WITNESSES THAT COMMODITY SHIPPED WAS AT LEAST POPULARLY KNOWN AS GASOLINE

The testimony of the expert witnesses both of the Government and of the defendant is so voluminous and diffuse as to make adequate discussion of it extremely difficult within any reasonable limits of this brief. It would, therefore, seem that the only practicable method of discussing this expert testi-

mony will be by outlining its general scope and the points of agreement or difference between the experts, with only such brief abstract of their testimony as will show the general conclusions here drawn from it warranted.

In general it may be said that all of the Government's experts agreed that both the shipments from Kiefer and Drumright of casinghead gasoline blended with naphtha, and the shipments from Jenks of unblended casinghead gasoline, were not only popularly known as gasoline, but were known as such throughout the gasoline industry; were chemically, and within the meaning of the tariffs as well, gasoline: and could not properly, under any circumstances, be described as "unrefined naphtha."

On the other hand, the defendant's experts, with equal unanimity, testified that the shipments were not gasoline *within their definition* of that term, and might properly be described as "unrefined naphtha."

It is, however, particularly to be noted in connection with the testimony of the defendant's experts:

First, that, without exception, they confined their definition of the term gasoline to such petroleum products as would operate an automobile or other internal-combustion engine.

Second, that no one of the defendant's experts testified that these shipments were not gasoline for transportation purposes, and within the meaning of the tariffs.

Third, that even they admitted that the blended commodity was popularly known as gasoline, and

further admitted that even in their opinion "unfinished naphtha" would have been a more appropriate name for it than "unrefined naphtha"; that their conclusion that it nevertheless might properly be called "unrefined naphtha" was based on their contention, which the Government experts denied, that "blending" was a process of "refining."

Fourth, that they, therefore, denied that either the shipments of straight casinghead gasoline, or of casinghead gasoline blended with heavier naphtha, were gasoline, on two grounds:

(*a*) Because they claimed, what incidentally the Government's experts controverted, that neither the blended nor unblended commodity would satisfactorily operate an automobile engine, and therefore would not come within the limited definition which they gave the term gasoline.

(*b*) Because they claimed that it was necessary to further blend the shipments after their arrival at Port Arthur, with additional naphtha and with refinery gasoline, in order to meet the specifications of their customers. Indeed, their counsel, Mr. Swacker, flatly claimed that no commodity was gasoline unless it fulfilled the particular specifications of a particular customer.

Fifth, and what is most significant, that none of the defendant's experts had the temerity to attempt to justify the description of the shipments of unblended casinghead gasoline from Jenks as "unrefined naphtha." Indeed, in reading the testimony of defendant's experts, one is struck by their careful

avoidance of any separate and distinct reference to these shipments of straight casing head gasoline from Jenks, unblended with any other commodity. The defendant obviously recognized the improbability of persuading the jury that these shipments, at any rate, could possibly be described as "unrefined naphtha," and, therefore, thought the less said about them the better. Moreover it will be noted that all the defendants' experts defined naphtha as a *distillate*, while casinghead gasoline is admittedly a *condensate*.

In short, it may fairly be said that the defendant's experts based their conclusions that the shipments were not gasoline, by arbitrarily limiting the meaning of that term to such "gasoline" as would satisfactorily operate an automobile engine, or fulfill the particular specifications of a particular customer, and by ignoring the definition given that term by the tariffs themselves, by the Interstate Commerce Commission for transportation purposes, by its admitted popular usage throughout the gasoline industry, and by its prior usage by the defendant itself.

Likewise, it is upon an equally arbitrary basis that the Circuit Court of Appeals chooses to disregard, and in certain respects even to misrepresent, the testimony of the Government's experts, and to adopt the conclusions of the defendant's experts in the face of the jury's findings and of the tariff provisions.

Before briefly abstracting the testimony of these expert witnesses, it will be helpful to give a short description of the nature and method of manufacture of casinghead gasoline; of the nature and method of manufacture of the naphtha shipped *northboun*

from Port Arthur to Kiefer and Drumright for blending with this casinghead gasoline for the *southbound* shipments to Port Arthur, covered by the indictment and of the subsequent further blending at Port Arthur, to comply with such specifications as to gravity and volatility as particular customers of the defendant might require. The facts stated in this connection are drawn almost entirely from the testimony of the defendant's experts, or of the defendant's officials and employees who were called as witnesses by the Government, and are practically undisputed.

NATURE AND METHOD OF MANUFACTURE OF CASINGHEAD GASOLINE

Casinghead gasoline is a condensate of natural gas obtained from oil wells, and drawn off separately from the oil through a separate tube or "casing," from which it gets its name. (Rec. 186.) The casinghead gas is passed through a compressor and compressed into gasoline. (Rec. 238.) Ordinarily there are no impurities in it, except accidentally some water or crude oil might come through the gas line. As a precaution against this, the gas, before being passed through the compressor, is passed through so-called scrubbing or meter tanks, which remove any foreign substance. (Rec. 236, 552.) The defendant's admitted that their plants at Kiefer, Drumright, and Jenks used this compression method, and were casinghead gasoline plants only. (Rec. 179, 180.)

The vapor tension of the casinghead gasoline as it came from the compressor varied from 20 to 30

pounds, the specific gravity from 88 to 90, and its color was generally water white. (Rec. 242, 554.) It is invariably shipped in clean cars.

The casinghead gasoline from Jenks was shipped to port Arthur unblended. (Rec. 207, 554.) Its vapor tension was reduced by "weathering" (exposure to the air, Rec. 213) to or below the maximum of 10 pounds, required by the Western Classification and the Commission's Regulations for the Transportation of Dangerous Articles, and varied from 7 to 8½ pounds (Rec. 600), its specific gravity being reduced to 77 to 80 (Rec. 599). Slater, another of the defendant's officials, says 75 to 85 (Rec. 639).

The casinghead gasoline from Kiefer and Drumright before being shipped *southbound* to Port Arthur, was blended with heavy naphtha shipped *northbound* from Port Arthur to those points for the purpose. The Kiefer blend was about $66^2/_3$ per cent gasoline and $33^1/_3$ per cent naphtha. The Drumright blend was about 65 per cent gasoline, and 35 per cent naphtha. The specific gravity of the blended commodity varied from about 77 to 80. (Rec. 594 to 596.) Slater says 72 to 85. (Rec. 640.) The vapor tension was about 8 pounds (Rec. 594) and the color test about 24 to 25 (Rec. 595), 25 being perfectly white, "like distilled water." (Rec. 364.)

It was this weathered unblended casinghead gasoline from Jenks, and the blended casinghead gasoline from Drumright and Kiefer, shipped southbound to Port Arthur, which was shipped by the defendant under the name of "unrefined naphtha."

It is the Government's contention that neither the weathered casinghead gasoline, which was itself, as has been seen, a pure and refined product, nor such casinghead gasoline blended with heavier naphtha, which it will now be shown was also a refined product, could properly be described as "unrefined naphtha."

NATURE AND METHOD OF MANUFACTURE OF NAPHTHA SHIPPED NORTHBOUND FROM PORT ARTHUR TO KIEFER AND DRUMRIGHT FOR BLENDING WITH CASINGHEAD GASOLINE

The defendant admits (Rec. 473, 474) that the naphtha shipped northbound from its refinery at Port Arthur for blending with the casinghead gasoline at its subsidiary's casinghead gasoline plants at Kiefer and Drumright, was painter's naphtha, or of a similar grade (Rec. 474). The gravity is shown as from 53 to 54. (Rec. 243.) Defendant's counsel claimed, however, that it was not "a refined product suitable for gasoline." (Rec. 474.)

Just what this statement of defendant's counsel meant is not clear. If by it he meant that this painters naphtha was not itself gasoline, the Government entirely agrees with him. If, however, he means that it was not a refined product suitable for blending to make gasoline, he is contradicted by Pritchard, Superintendent of the defendant's refinery at Port Arthur, who testified (Rec. 586) that additional amounts of this same painter's naphtha were used at Port Arthur itself for the final blending, to produce what the defendant itself admits was gasoline. This was also testified to by defendant's

Assistant Superintendent Slater. (Rec. 657, 658.) However, defendant's counsel himself, in connection with a previous refusal to admit that this northbound naphtha was refined (Rec. 467) stated:

> We will admit that it was a treated naphtha, and would be a sufficiently treated naphtha for some purposes, and we are perfectly willing to admit the exact character of it.

Curiously enough, the record does not show exactly where painter's naphtha stands relatively in the list of various naphthas, but the Government's expert Dykeman, testified that it underwent three refinery processes (Rec. 879), and that the putting together of two refined products, such as painter's naphtha and casinghead gasoline, could not produce an unrefined product which would justify a designation such as "unrefined naphtha."

FURTHER BLENDING AT PORT ARTHUR TO MEET PARTICULAR SPECIFICATIONS OF DEFENDANT'S CUSTOMERS

The defendant's Assistant Superintendent at Port Arthur, Slater, testified (Rec. 660) that the blended shipments from Kiefer and Drumright were never used at Port Arthur to fill orders for gasoline, without further blending with more painter's naphtha, and with refinery gasoline. This also was the testimony of defendant's Superintendent Pritchard. Slater testified (Rec. 659) that the proportion of casinghead gasoline in the product finally sold from Port Arthur to their customers as gasoline, was from 5 to 12 per cent. He was unable, however, to state the proportion of refinery gasoline and heavy naph-

tha, saying that all the ingredients varied to meet various specifications. Miller, an expert witness for defendants, stated that the casinghead would run from 3 to 10 per cent of the final product. (Rec. 740.) Burrell, another expert for the defendant, says 5 per cent to 30 per cent; generally 25 per cent to 30 per cent. (Rec. 701.) On the other hand, Millard, who had been Assistant Superintendent and Superintendent of the Gypsy Oil Company's casinghead gasoline plant at Kiefer, testified that the blended casinghead was marketed direct from Kiefer to customers at various places, including Saint Paul and Pittsburgh, as gasoline. (Rec. 555.) This was from 1914 to 1916, and the only difference, if any, in that product and what was shipped to Port Arthur from Kiefer, was in the different gravities that might be blended to meet the particular specifications of their customers.

It also appeared that the shipments from Kiefer, Drumright, and Jenks went directly into the gasoline tanks at defendant's refinery at Port Arthur, and that the defendant had no tank designated for "unrefined naphtha." (Rec. 656.)

ADMISSIONS OF DEFENDANT'S EXPERT WITNESSES

SLATER, Assistant Superintendent, Gulf Refining Company, Port Arthur (Rec. 630 to 667):[1]

Says correct name of blended casinghead gasoline as received from Kiefer "unrefined naphtha," but admits "we call it usually Kiefer gas." (Rec. 665.)

[1] Pages of record between which each expert's testimony will be found, are given immediately following each expert's name.

Admits to court that better designation for blended Kiefer casinghead gasoline would be "unfinished naphtha," rather than "unrefined naptha." (Rec. 657.)

Admits that "may be" Kiefer casinghead gasoline is pumped directly into gasoline storage tank at Port Arthur. (Rec. 658.)

Admits doesn't know whether product similar to Kiefer casinghead gasoline is marketed as gasoline. (Rec. 663.)

Admits knows of no book where term "unrefined naphtha" is applied to casinghead gasoline. (Rec. 662.)

TABER, Vice President, Gulf Refining Company (Rec. 667 to 685; 772 to 785):

"Naphtha" term generically applied to *distillates* from crude oil above a gravity of 52; that is above kerosene. (Rec. 671.)

Term "gasoline" originally confined to that of 76 to 80 gravity used for making light, and continued so to be used until automobiles came along. (Rec. 672.) There wasn't enough of this kind of gasoline to supply them, so they had to go to the naphtha to get something heavier. Their carburetors, at that time, had been made to use this very light material, and so they had to change their carburetors to burn the heavier material, and they called that gasoline. That isn't the proper name for it from the technical standpoint. The automobile business has run away with the crude oil business, particularly with the terminology of the business. The automobile business dominates the

names used in the gasoline business, and they call the product all sorts of names. Some call it benzine because they talk about benzine buggies; some call it naphtha; some gasoline, and some use the name gas for short. We, as refiners, have to know all those names. They call it naphtha when used in a launch. (Rec. 673.)

Gasoline in the strict technical sense of the word, is a product which is substantially 76 to 80 gravity—*a refined distillate from petroleum which is suitable for use in carbureting air for making gas suitable for burning in private dwellings.* That is one of the articles of commerce known as gasoline. Now there are other articles, and that has been developed by the automobile business. *For that purpose we will say that gasoline is a product, a combination of products* of naphtha produced from crude oil, natural gas, casinghead gas, and other sources, *which are made suitable for use in the general run of automobiles* which use suction carburetors. *It has to be suitable, however, for such use. Casinghead gasoline produced at*

NOTE.—Witness here uses refining to mean the further blending performed at Port Arthur. He says blending is refining and gives the following illustration (Rec. 681):

"Sterling silver is 92½ per cent pure silver and 7 per cent copper. Now, if you have a mixture, if you have 100 pounds of what is found to be sterling silver and 7½ per cent copper, there is no extraneous matter in it, but if you happen to have 100 pounds of mixture, put out to be sterling silver, and found 8 pounds of copper, then you would have some extraneous matter. Now there would be two ways of refining that copper. One would be to take so much out of that copper so what was in there would not be more than 7½ part of the hundredth of the whole; or you could add enough pure silver to it so there would not be more than the proportion of 7½, and when you do it either way you will comply with the specifications, and either would be refining

Kiefer, Drumright, and Jenks doesn't fulfill either of these specifications for gasoline. I do not consider it gasoline. I consider it unrefined naphtha because it requires refining to fit it for the market. (Rec. 678.)

Admits that casinghead gasoline is called by other people, blended gasoline, but says that defendant calls it "unrefined naphtha." (Rec. 683.)

Says "unrefined naphtha" is perfectly proper name for blended casinghead gasoline, but *acknowledges he would prefer to call it "unfinished naphtha."* (Rec. 684, 685.)

Furnishes bibliography of petroleum products. (Rec. 772 to 785.) Out of all the books mentioned, he admits only two mention "unrefined napthha." He quotes only one of these two—Bacon & Hamor. (Rec. 784) as saying:

> "Naphtha distillate (Unrefined Naphtha) as those fractions which boil up to 150 degrees C. under atmospheric pressure."

Witness says this definition comprehends casinghead gasoline.

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it. Either taking out a part of the impurity or adding so much of a pure material to make up the specifications."

The witness's false analogy shows exactly why *blending* of casinghead gasoline with heavier naphtha and refinery gasoline at Port Arthur, *is not refining.* The casinghead gasoline is a more volatile and higher grade commodity. See testimony of defendant's expert Burrell. (Rec. 707.) The object of blending at Port Arthur is merely to reduce its volatility. A correct analogy, therefore, would have been a case where it was found that 100 pounds of supposed sterling silver, contained 93 pounds pure silver (casinghead gasoline), and 7 pounds of copper (less volatile naphthas). In order not to exceed sterling silver specifications, it would be necessary to get rid of the extra half pound of pure silver and replace it with half a pound of copper. This could be done either by taking out some of the silver, or adding more copper in the proper ratios. But in either event, it would not be a process of "refining," but of coarsening or debasing, not "refining."

Obviously this is inaccurate, as casinghead gasoline is not a "naphtha distillate," but if naphtha at all, it is a naphtha "condensate."

BURRELL, Superintendent of two refining companies in no way related to defendant (Rec. 685 to 708):

Says blending is a refining process. (Rec. 689.)

Technical definition of naphtha is light *distillate* which comes off crude oil in the process of refining down to kerosene, sometimes including kerosene. This generic definition is specifically used to mean 48 to 60 gravity used to mix with natural gas gasoline in the art of blending. Also to designate painter's naphtha which has a gravity of 52 to 54.

Defines gasoline "as a liquid inflammable substance or mixture of hydrocarbons *suitable for use in an automobile to-day.*" (Rec. 691.)

Admits casinghead gasoline already partially refined in ground. (Rec. 693.)

Says blended shipments of casinghead gasoline from Kiefer and Drumright, and unblended shipments from Jenks are not gasoline, *but admits popularly called gasoline,* and that he has called them so himself, "but material I am talking about is not gasoline, and does not come under that category until properly prepared for market."

"Unrefined naphtha" is proper name for casinghead gasoline blended or unblended, *but would prefer designation "unfinished naphtha."* "Gasoline" is wrong name. (Rec. 694.) Would really like word "condensate" in speaking of natural gas gasoline.

Neither raw casinghead gasoline nor Kiefer blended casinghead gasoline will in general run a Packard or a Dodge car, and, "therefore, is not gasoline in my definition of the term." (Rec. 695.)

Not gasoline because too volatile. Similar in this respect to "still" gasoline. (Rec. 700.)

Defines "refining" as " preparation of raw material for market." Says general practice is to put 25 to 30 per cent casinghead gasoline into gasoline. Some refineries put 5, some 10, some 25, and some 30. (Rec. 701.)

First admits blending is essentially mixing (Rec. 704), and then says it is not merely mixing. (Rec. 705.)

Admits blending does not remove any impurities.

Admits never used term "unrefined naphtha" in any book written by him. Admits called blended material in a book written by him "blended casinghead gasoline." (Rec. 706.)

Admits that he wrote in same book:

> The natural gas gasoline is not only valuable because of the product itself, but because it is of very high grade, so high in fact that it is not economical to use it alone, but so it is mixed with low grade refinery naphtha, and the so-called cracked gasoline, a great deal of which is being made at the present time.

Witness then says (Rec. 707, 708):

> I will tell what I mean by the term "high grade." Automobile makers have changed their carburetors as fuel became scarcer and scarcer, until to-day that carburetor is made

to suit a much more lower grade fuel than the high grade fuel of a few years ago; so to-day the low grade fuel is a high grade fuel, because that high grade fuel of a few years ago will not operate an automobile satisfactory. * * * High grade was used in the sense of high in gravity. High grade really conveys a wrong impression unless one is familiar with casinghead gasoline.

Q. So that in this case according to your investigation and knowledge of the situation, is it not a fact what is refined if anything, is the low grade refinery product at Port Arthur?

A. I certainly would not admit that, one helps the other. You have each to help the other. The casinghead gasoline is made available for use by motor trade and the heavy distillate is made available each helping the other. One supplies the upper range in the boiling point, that is the naptha, and the other, the casinghead gasoline, supplies the lower range, in other words makes an automobile engine easier to start—One helps the other.

Q. Now, Mr. Burrell, is it true that what is shipped is gasoline of a very high grade, but may be properly called unrefined naphtha?

A. I would not say that. You are speaking of high grade gasoline. The material which you call high grade gasoline is really selling to-day in Oklahoma for four or five cents less than the regular automobile gasoline.

Q. Has that been just in the last few months?

A. Yes, sir.

Q. Now, wasn't that due to a particular transaction in the oil trade?

A. I don't know what caused it.

Q. Isn't that due to the fact that the Standard Oil Company made some change in its internal policy?

A. I had so heard.

* * * * *

A. I will admit that this natural gas gasoline is a very fine material; it has helped out the automobile industry; it is very valuable but casinghead gasoline helps the naphtha just as much as the naphtha helps the other. They are invaluable to each other—You can not say that this material is not high grade (I don't mean it is low grade). It is a very valuable commodity.

Q. Now in what respect is it unrefined?

A. It is not ready for the market.

DOCTOR GARNER, Chemical Engineer (Rec. 708 to 715):

"Naphtha" generic name for everything above kerosene. Used specifically also in connection with certain grades of marketable products like naphtha "a," naphtha "b," naphtha "c," or painter's naphtha or stove naphtha, or solvent naphtha. These may be either refined or unrefined articles.

Gasoline in the strict sense must be that low boiling portion of naphtha having a gravity of 76, possibly to 82, and usable for purposes of illumination.

Definition of it as article of commerce would require witness to divide it into a number of component parts.

Witness fails to make such division but in answer to his counsel's question:

"Is gasoline a term applicable to product for use for vaporization purposes?

"A. It is."

Also that as used commercially it is a finished product as distinguished from an unfinished product.

Does not consider anything may be properly called gasoline that could not be used for vaporization purposes, such as running a car or gasoline stove.

Says Kiefer, Jenks and Drumright products are not gasoline, but are "unrefined naphtha." (Rec. 711.)

Admits does not know whether casinghead gasoline is or is not the gasoline sold to-day to run gas machines.

Admits that there is a kind of gasoline called "export gasoline," which is made from casinghead gasoline blended.

> Q. The gasoline to be used in a motor car is not the only kind of gasoline, is it?
>
> A. In the common acceptation of the term, I believe that of 96 per cent of all the material used and called gasoline is used in internal combustion engines with suction carburetors.
>
> Q. The term, however, embraces many kinds of gasoline, does it not?
>
> A. Many kinds of gasoline—if you will say specifications of gasoline. (Rec. 712.)

Says in his definition of gasoline as composed of lowest fractions and of a gravity ranging from 76 to 82, casinghead gasoline would still not be gasoline

if it had such boiling points and gravity. Would not give same curves, and varies in amounts of constituent hydro-carbons. Says casinghead gasoline is unrefined.

SCHOCK, Chemical Engineer (Rec. 716 to 734):

The material used to-day under the word gasoline, is not identical with the material called gasoline years ago. The material now used in automobiles would then probably have been called naphtha. Gasoline originally was used in gasoline stoves, and the not differ exceedingly from the present gasoline, but in another way it does. The quality and the volatility has been steadily lowered in order to meet the greater demand. Witness won't say that twenty years ago gasoline was a different material but it was a gasoline that had a lower boiling point; was more volatile as a whole than the present gasoline. (Rec. 719.)

Gasoline was always used to be vaporized. Can not be defined in a word. It is material derived from petroleum. It is a liquid volatile, inflammable, but so made up in such proportion that a part only will volatilize when air is going through it as is done in the ordinary automobile carburetor.

In distilling crude oil the first portions that come off collectively are known as naphtha. Naphtha designates any volatile inflammable liquid hydrocarbon mixtures with a prefix added for the name of the naphtha. (Rec. 720.) The term naphtha includes any gasoline, but all naphthas are not necessarily gasoline.

Shipments from Kiefer, Drumright, and Jenks to Port Arthur are not gasoline, and appropriately described as "unrefined naphtha." (Rec. 721.)

Witness says blending is an essential operation in at least two, and probably more commodities obtained from a refinery, but unlike defendant's previous witnesses, this witness does not say that blending is refining. (Rec. 727.)

MILLER, Consulting Engineer (Rec. 735 to 747):

"Still" gasoline and casinghead gasoline are not finished gasolines, and are substantially similar. (Rec. 737.) Both must be blended with refinery gasoline to be used in automobile motors.

Defines gasoline as being generally that fraction of crude petroleum or similar products lying within the range of boiling point and other necessary physical tests, *which will satisfactorily and economically operate an internal combustion motor.* Kiefer, Drumright and Jenks shipments are not gasoline as will not do this. Blending necessary. (Rec. 738.)

NOTE.—The Director General will not attempt in this brief, either in the case of these witnesses, nor of other expert witnesses for the defendant, or for the Government, to abstract their testimony as to whether the "weathered" casinghead gasoline shipped from Jenks, or the blended casinghead gasoline shipped from Drumright and Kiefer, could be used to operate an automobile. The testimony of the witnesses was in hopeless conflict, both as to theory, and as to the result of certain actual tests made during the trial. It is to be observed, however, that the defendant's witnesses who denied that it could be so used, did not attempt in the tests, to readjust the carburetors, or to say that they could not be readjusted. In any event, the testimony of neither the defendant's nor the Government's witnesses, is abstracted, because the Government considers it in no way decisive of the question as to whether or not the casinghead gasoline shipped from Keifer, Drumright and Jenks, to Port Arthur, was gasoline, *within the meaning of the tariffs.*

Says at Cosden and other refineries he has observed only three to five per cent of casinghead gasoline is used in final blending.

The word "naphtha" is used in the refining business generally as the generic term of that fraction obtained by the *distillation* of the crude oil before the product kerosene is reached. It is also used more specifically to cover the heavier blending materials which are used in connection with the compression plants in some parts of the country. It is also extended by the individual manufacturer even farther than that. The Tide Water Oil Company, for instance, applies the name "naphtha" from the beginning of the process to the finished product itself which others call gasoline. (Rec. 740.) Blending is a process of refining.

Jenks, Kiefer, and Drumright shipments properly designated by name "unrefined naphtha," *but "unfinished naphtha," or unfinished gasoline blend, or unfinished casinghead, or unrefined casinghead blend would be more descriptive.*

"Unrefined naphtha" will embrace any naphtha product which is not being completely refined ready for use. There is a great deal of confusion and misuse of names within refineries, of products. Each Superintendent of refineries, and a good many employees, have a great many ideas about nomenclature. (Rec. 741.) As used, termed gasoline in a more or less limited sense in testimony.

Q. Take, for example, a quart of gasoline which is produced by a still-run process?

Its color, normal, when it is properly prepared, its gravity and all of the other characteristics meeting with the specifications in the refinery but do not meet the specifications of the sale, is it gasoline when it is produced from the refinery or is it only gasoline when it comes up to these particular specifications?

A. It is my practice in the refinery to call such products naphtha, although finished—although unrefined or unfinished until they meet gasoline specifications, until so blended and so put through the process to meet the specifications involved in the sale of the gasoline in question.

Q. Suppose they did not exactly meet all of the specifications, wouldn't they inherently be gasolined just the same?

A. They would inherently be substantially the same product, but I would not call it gasoline in the ordinary practice; in my experience with the Pierce oil plant, we called everything naphtha with the various qualities until it reached the stage when we applied, when it reached the finished stage and ready for shipment. The company's trade name for output number 2 was pennant gasoline, I don't claim the mere calling of it naptha would—at one time and gasoline at another time inherently change the characteristic of the product. (Rec. 744.)

Admits never heard casinghead gasoline called "unrefined naphtha." More usually referred to as compression blend or casinghead naphtha blend. In a generic sense, "unrefined naphtha" would be more

proper than "unrefined gasoline," but neither of the two terms in witness's opinion are quite descriptive enough for general refinery usage. (Rec. 745.)

"Unrefined naphtha" is not a term generally applied to casinghead gasoline. (Rec. 746.)

BACON, one of the authors of Bacon & Hamor (Rec. 748 to 772):

Material now called gasoline not manufactured before automobiles came into use. (Rec. 749.) Shipments from Kiefer, Jenks and Drumright to Port Arthur not properly called gasoline. *"My definition for gasoline* would be this, gasoline is a mixture of combustible liquids, *a finished product that will satisfactorily run a motor car."* (Rec. 750.) Inclined to believe that if anything will come along to-morrow that will properly run an automobile, and it was derived in a large part from petroleum, that that material would properly be called gasoline * * * The situation is so desperate at the present time in regard to supplying the demands of automobile users, that every refining company is reaching out for material which can possibly go into gasoline, and I haven't any doubt that in the next three or four years, possibly sooner, new material will come in, and if those materials go in with petroleum distillatex, I believe that that product is correctly called gasoline. (Rec. 750, 751.)

Doesn't believe that terms, gasoline, kerosene, lubricating oils, which includes the three principal products of petroleum, have ever been correctly applied, except to the finished product.

Regards name "unrefined naphtha" as a proper designation for this material. Not the most descriptive designation, but a proper one. Comprehends more than merely casinghead gasoline. Includes any naphtha that has not been brought to a finished state. Blending is part of refining. (Rec. 764.) Enables refinery by blending to use wider cut of other petroleums.

Q. You have a material which you call casinghead gasoline. It is somewhat too volatile, to lower the volatility you add naphtha to it, or some other petroleum product, and you get what you admit would be gasoline; is that correct?

A. I admit that it is not gasoline.

Q. But you mean the final blended product is not gasoline?

A. *If it is blended in such a way as to meet the specifications or* leaving the specifications out of consideration, *if it is blended in such a way that it will run a motor car, I call it gasoline; if not I don't call it gasoline.*

Q. If I understand you correctly, what is universally known as casinghead gasoline, you call unrefined naphtha, is that correct?

A. That is correct. I don't mean it is universally known as casinghead gasoline.

Q. Do you show that in your book?

A. I have no doubt that it is called casinghead gasoline.

Q. Didn't you just call it gasoline?

A. I think probably because I have always assumed the word casinghead gasoline is really a compound word, because I have always known

that casinghead gasoline was a different type of material from what we commonly call gasoline; perhaps I can illustrate what I have in mind better by giving an illustration * * *

Q. When this product which you in your book call gasoline is somewhat too volatile to denominate as gasoline it can be properly called unrefined naphtha, is that correct?

A. Yes, sir.

Q. And you then add a little more of the same material to get it back to gasoline?

A. I did not say add a little more, but add the proper amount of the same material and other materials, and then you can bring it to gasoline.

Q. Now, as a matter of fact, is casinghead gasoline unrefined in any respect, or is it not refined below the surface of the earth by a natural process?

A. I consider it unrefined because I consider any product that comes out of the ground unrefined. * * *

Q. You have a false assumption, because the gasoline does not come out, but the gas. * * *

Q. Now after this gasoline is liquefied and compressed into gasoline, is it not a fact that the liquid is a clear white color—is it not a fact that it has all the appearances of a high state of refined gasoline?

A. The product that comes out of the ground and as made by manufacture, as a general rule, is of a good color; that is, a color that approaches a water-white color, but I don't consider that has anything to do with

whether it is refined or not. I call the substance refined when it is up to the standard; it is not refined. * * *

Q. I will ask you if it is not a fact a great many things may be in a high state of refinement and yet not be such as to be marketable?

A. Yes. (Rec. 769, 770.)

Can't, offhand, name a technical word that denominates casinghead gasoline as "unrefined naphtha." (Rec. 772.)

TESTIMONY OF EXPERT WITNESSES FOR GOVERNMENT

HAIGH (Rec. 394–408), Superintendent Ajax Casinghead gasoline plant, located at Jenks, says casinghead gasoline is gasoline (Rec. 395) and that blend of two-thirds casinghead gasoline and one-third naphtha is gasoline.

Designates blend when vapor pressure is less than 10 pounds as gasoline. (Rec. 401.)

Calls unblended casinghead "raw gasoline," and after blending with naphtha calls it gasoline. (Rec. 402.)

LEAGUE, Inspector of Bureau of Explosives (Rec. 408–455), after testifying had inspected all casinghead gasoline plants in the country, and after naming numerous ones that called product "gasoline" and described it as such for shipping, defendant's counsel admitted (Rec. 427) that witness would testify to same effect as to all plants inspected by him.

Witness says liquified petroleum gas, even above 10 pounds pressure, called "gasoline" around the plants.

Q. (By Mr. SWACKER.) Now, referring to it in the vicinity of these plants, I understood you to say a few moments ago that notwithstanding the description required by these rules of liquified petroleum gas when the vapor tension exceeded 10 pounds that no distinction was made by the producer but they called it gasoline.

A. Yes, sir.

Q. Now, then, that name liquified petroleum gas is a very proper name of the commodity.

A. I should think so.

Q. And might with entire accuracy be applied to the commodity even though the vapor tension did not exceed ten pounds. Is that true?

A. *Aside from the shipping.* (Rec. 445–446.)

Has heard blended commodity called by various names according to blending material as such, "blended gasoline," "kerosene blended," "gas oil blended." (Rec. 446.)

Q. Now you state shipped by the Gypsy was practically of the same character as that shipped by the other people from whom you got your general information that it was called gasoline. And you say practically—when you say practically all the same, you embrace within that all this wide variety of blends; is that true?

A. Of the naphtha blends. Yes. (Rec. 447.)

Only people he has ever heard call blend of casing-head gasoline and naphtha "unrefined naphtha" are the Gypsy Oil Company and its employees. (Rec. 448.)

Witness says has never seen blended casinghead gasoline shipped to any other refinery than defendants as "unrefined naphtha." (Rec. 451.)

In speaking of "raw casinghead gasoline" meant unblended—did not mean to intimate that it was in a crude or unrefined state. (Rec. 451.)

SCOTT, Inspector of Bureau of Explosives. (Rec. 455–461.)

Has inspected all casinghead gasoline plants in the State of Oklahoma. (Rec. 456.)

Designates kind of gasoline by method of production, that is, calls casinghead blend gasoline "casinghead gasoline"; calls gasoline from refinery "refinery gasoline." All other casinghead gasoline plants called blended shipments "gasoline." (Rec. 461.)

BARNHART, of the Franchot plant, says that they call blended casinghead gasoline "gasoline," and that they shipped it under that name. (Rec. 462–3.)

PRITCHARD, Superintendent Gulf Refining Company, Port Arthur, (called as witness for Government.) (Rec. 576–603.)

Admits referred to still gas as "high gravity gasoline" but refuses to admit that Kiefer casinghead gasoline was "high gravity gasoline."

Does not consider anything gasoline except what meets specifications. (Rec. 601.)

> The COURT. *Well, would it be high gravity gasoline as generally termed in the refinery world?*
>
> A. *Yes, sir.*
>
> Q. (By Mr. SWACKER). But it isn't called gasoline. Is that correct?

A. No, not what I term——

The COURT. What you term "gasoline" is when it is finished in accordance with the specifications of the purchaser?

A. Yes, sir.

The COURT. So you don't call anything gasoline until it meets the specifications of the man that buys it for the market?

A. Yes, sir.

The COURT. Then there would be different kinds of gasoline, wouldn't there?

A. Yes, sir.

The COURT. One man would have one specification and another man another. Then how would you distinguish the different kinds of gasoline of that kind?

A. The different specifications call for at different billing points.

The COURT. What would you call it?

A. Might call it South Carolina gasoline, motor gasoline, what we used to call Bohme gasoline.

Q. So now, if this commodity that was shipped from Kiefer to Port Arthur, if it met the specifications of the customer for gasoline, then you would call that gasoline, if it did not, call for any further treatment to meet it?

A. If it did not require any further treatment to meet the specifications, it would be classified as gasoline.

Q. (By Mr. SWACKER.) Did you ever know of any of this material from Oklahoma that would meet any specifications for gasoline?

A. No; I did not.

> The COURT. You mean the specifications of those that were ordering it? Is that what you mean? (Rec. 601–2.)

Defendant's counsel, Mr. Swacker, then attempted to lead witness into saying that he never knew any specifications which casinghead gasoline would meet, but witness answers "Nothing I would recommend it for."

NOTE.—Following colloquy occurred between Court and defendant's counsel, Mr. Swacker and Mr. Pritchard (Rec. 590):

> The COURT. Here is a point in my mind. It says now unrefined. Now, unrefined is used in a sense that it is not a finished product. If it has been refined at all, can you say it is refined?
>
> Mr. SWACKER. A product is unrefined only until it is refined, if there is any refining done in connection with it.
>
> The COURT. He says the blending these two products here at Kiefer, that that is the process of refining.
>
> Mr. SWACKER. Yes; partially.
>
> The COURT. How can you say it is unrefined if it has gone through the process of refining?
>
> Mr. SWACKER. We say anything is unrefined until it is refined; refining is the producing finished operation.
>
> The COURT. Unrefined means there in the sense that it is not a finished product, and was that the intention?
>
> Mr. SWACKER. Absolutely. That is exactly what these letters show. That it is not finished.

Q. (Mr. PRITCHARD.) Is any of the product refined at the Port Arthur refinery a refined product until it is finished?

A. No; we don't consider it so.

The COURT. Now, you mean finished is when it is put in a state to meet the specifications of the purchaser?

A. Yes, sir.

The COURT. *And then anything might be gasoline as you term it gasoline for one purchaser and not gasoline for another purchaser, according to the specifications requested?*

A. *Yes, sir.*

DYKEMA, Consulting Petroleum Engineer (Rec. 822–842, 852–878).

Compression of casinghead gasoline not a refining process, but casinghead gasoline produced by compression is a refined product. (Rec. 833.)

It needs no purification but is used directly as made without any change in the majority of instances and in great bulk. It is already refined by natural process under ground and does not require any refining after it is compressed into liquid state. (Rec. 834.) Refined in earth by rock pressure, it causes practically the same process as distillation and refining of crude oil in still. Condensation of vapor from still and of casinghead gas from ground produces practically the same liquid.

Mr. SWACKER. *We are not disputing that it amounts to or is analogous to a refining process, but the question implies that that made it completely refined. We say it only makes a partial refining.* (Rec. 838.)

After compression casinghead gasoline is a refined product. (Rec. 839.) Casinghead gasoline is commonly known as gasoline in trade and in the scientific world. Never heard it called "unrefined naphtha." "Unrefined naphtha" not an appropriate name because misleading; implies it would need further refining and further purification, which is not the case. (Rec. 840.) Blending is mixing, not refining. There is no purification. It is never referred to as a refining process. (Rec. 841.)

Visited Gypsy Oil Company's plant at Kiefer in 1916. This product was casinghead gasoline, a water-white colorless liquid. It was not unrefined naphtha. (Rec. 852.)

Fact that product of Kiefer plant failed to meet certain specifications of customer of refining company does not say that product was not gasoline. Blending not refining, as it removes no impurities. (Rec. 853.)

Might be called a finishing process, from the standard of meeting certain specifications. Casinghead gasoline is blended for two purposes—one to make it less volatile for handling; the other to conserve the product. Blending is usually done at the casinghead gasoline plant and it is frequently marketed direct. (Rec. 854.)

Casinghead gasoline can be marketed without blending. (Rec. 855.)

Term "unrefined naphtha" is not used in scientific works as describing casinghead gasoline.

Visited every casinghead gasoline field in the country and never heard casinghead gasoline called "unrefined naphtha." (Rec. 856.)

Gasoline has no particular specifications. There may be a number of specifications. Judged by some specifications, casinghead gasoline might be called "unfinished gasoline." (Rec. 859.)

Statement in pamphlet prepared by witness that "gasoline produced by compression is also an undesirable fuel for gasoline engines" is true in many cases and untrue in others. A compression blend product can be made where it is perfectly satisfactory for fuel and in many cases is so made. (Rec. 863.)

Naphtha fractions, including gasoline, have for a long time been called by the generic name "naphtha," even including kerosene at times. Terms "gasoline" and "naphtha" can be used interchangeably with relation to the material with which gasoline as a finished product is made. Naphtha is a generic term and embraces all gasoline. Refining is a process of removing impurities. An already naturally pure product would be classed as a refined product.

> "Q. (Mr. SWACKER.) If it is unnecessary to make a thing pure because it is pure, it would be unrefined though it would be pure.
>
> A. You could make such a statement, make such a play of words." (Rec. 869.)

Casinghead gasoline is often called "raw casinghead." It is known and sold as gasoline. (Rec. 870.)

Very often in trade qualify the name "gasoline" by the kind or blend. A distillation test not neces-

sary to determine whether the commodity is gasoline. (Rec. 871.)

"Unrefined Naphtha" would mean lighter cuts of petroleum which needed further purification. This does not embrace casinghead gasoline. Might include still gas gasoline, because that could be called naphtha. (Sec. 872–3.)

> Q. Now, in this distillation you claim takes place in the earth, if this is a part of the crude oil, as you claim it is, is it not a naphtha part?
>
> A. In a broad sense I think it could be called a naphtha part, although that impression (description) is never given to any material in the earth. *Speaking of naphtha, naphtha is a refined product of naphtha distillation.* (Rec. 873.)

Where casinghead gasoline is blended with crude oil, it would need further refining. When blended with refined product, such as naphtha, it does not need further refining. *By term "unrefined naphtha" means a distillate which needs further refining, more usually called crude naphtha. Casinghead gasoline does not require further refining.* (Rec. 876.) Blending comes after the refining of the gasoline is completed. (Rec. 877.)

DEBARR, Vice President Oklahoma State University and Head Department of Chemistry (878–892).

Compression of casinghead gas produces casinghead gasoline. There are other kinds of gasoline—motor gasoline, casinghead gasoline, gas-machine gasoline, cleaners' gasoline.

Casinghead gasoline is not properly denominated "unrefined naphtha" because it is a pure refined product as it comes from the earth. The blending of casinghead gasoline with naphtha which has been given the usual three refinery processes does not produce "unrefined naphtha" because both products before put together are refined and putting two refined products together is not a process of refining. (Rec. 879.)

Could not take casinghead gasoline and blend it with refined naphtha and produce "unrefined naphtha" and then by addition of more of the same naphtha come back to gasoline. (Rec. 880.)

NOTE.—That this could be done would be the logic of the defendant's contention.

The fact that a particular gasoline is too volatile for use in an automobile does not justify calling that gasoline something else. Casinghead gasoline has practically the same chemical properties as refinery gasoline except in proportions. Even if recovery from casinghead gasoline was only 88 per cent, it would still be gasoline. Fact of failure to meet specifications of Gypsy-plant customer for gasoline would not justify calling it some other name. The quality in gasoline which makes the prompt starting of an automobile is the low-boiling constituents. (Rec. 880.) The more volatile a liquid, the easier it is to start an engine. The blending of casinghead gasoline with refined naphtha would not tend to refine the casinghead gasoline by the mere mixing of the two together. The fact that casinghead

gasoline is blended in order to lower its gravity does not justify calling casinghead gasoline "unrefined naphtha."

Does not know of any scientific work calling casinghead gasoline "unrefined naphtha," nor has he ever seen it used in trade journals. The only place he has seen the term used is in Bacon & Hamor, and then not under head of casinghead gasoline. (Rec. 881.) That book did not describe casinghead gasoline as "unrefined naphtha."

Says he has used casinghead gasoline to run a Paige seven-passenger sedan (Rec. 882). Too volatile for safe use in this manner generally. (Rec. 883.) Uses "refined in the sense of pure" and has no need of any purification for the purpose for which it is applied. (Rec. 885.)

> Q. (By Mr. SWACKER.) But it is also necessary, in the manufacture of gasoline, even in the sense of pure, to do something to correct its boiling point?
>
> A. Yes.
>
> Q. And that is frequently done by a refinery?
>
> A. Yes, and it is done without one. With or without one, either. (Rec. 885.)
>
> NOTE.—Mr. Swacker's question shows that he confuses anything done at a refinery with "refining."

The lighter hydro-carbons are in larger proportion in the casinghead gasoline and the heavier constituents of hydro-carbons are in lesser amount, while the straight run gasoline might have a preponderance of the lighter or still going down, you have the

heavy constituents, but it will also have the lighter ones, and it sometimes and in some fields varies in this in the mid-continent field, just the same as casinghead gasoline.

Never heard of casinghead naphtha before witness heard it in this case.

Terms "naphtha" and "gasoline" are applied interchangeably with a great deal of confusion. (Rec. 888.) Principal difference between casinghead gasoline and refinery gasoline is in degree of preponderance of lighter against heavier hydro-carbons. Also test as to whether or not it would run a car. You can get down to a point when you would get such a preponderance of lighter hydro-carbons you could not run the car, and also where too heavy hydro-carbons it would not operate a car. (Rec. 889.)

Does not know whether Bureau of Mines or Bacon & Hamor originated term "unrefined naphtha." NOTE.—Neither of these publications refers to casinghead gasoline under this name.

Uses prefix in casinghead gasoline just as witness would speak of ordinary gasoline as motor gasoline, and gas machine gasoline as gas machine gasoline. Every gasoline has a special prefix. Gasoline as "commonly used" embraces casinghead gasoline. (Rec. 890.)

Uses gasoline as a generic term. Uses plural when witness wants to speak of any particular kind of gasoline and specifies the prefix to indicate what kind of gasoline. Uses it as embracing finished or

perhaps slightly unfinished, but not unfinished for purpose for which it is to be used. (Rec. 891.)

> Q. Now from your observation of the practice of refiners, I will ask you if it is not your practice to use the word refined as applicable to the products produced by the refineries?
>
> A. Yes, sir; they do. I suspect, that is my opinion, that is what I have got from talking with them.

NOTE.—This again illustrates confusion in use of term "refined" by defendant's counsel. If defendant's counsel and refineries are correct in such use, it demonstrates among other things that the naphtha produced at defendant's refinery and shipped northbound to Kiefer, Drumright, and Jenks was refined, though they contend it is "unrefined."

As was stated, the foregoing does not pretend to be a comprehensive abstract of the testimony of either the defendant's or the Government's expert witnesses. It is sufficient to show, however, that, as already suggested, the defendant's experts justified their conclusions that the indicted shipments of blended and unblended casinghead gasoline were not gasoline, by arbitrarily confining their definition of that term to such gasoline as would satisfactorily operate an automobile engine; that they acknowledged that such blended and unblended commodities were popularly known as gasoline, and that they did not attempt to say that they were not gasoline within the meaning of the tariffs; that while they further

undertook to justify the application of the description "unrefined naphtha" to such shipments, they all admitted that at least a more descriptive term would have been "unfinished naphtha"; that they all defined naphtha in the generic sense as a *distillate,* while admitting that casinghead gasoline is a *condensate;* that, so far as they justified the use of "unrefined," they did it on the ground that further blending was necessary before such shipments could satisfactorily be used to operate automobile engines, or to fill the specifications of their customers, and that they considered "blending" a process of "refining"; that the court itself pointed out to them that calling a commodity "unrefined" meant it was not refined at all, and that their own counsel admitted that these shipments were, at least, "partially refined."

Certainly on these admissions, even without reference to the testimony of the defendant's experts, the court was entitled to let the question go to the jury, as to whether the shipments were gasoline or were "unrefined naphtha," and certainly there was at least substantial, if not conclusive, evidence to support the jury's finding that the shipments were gasoline, as charged in the indictments.

(g) LETTERS OF DEFENDANT'S TRAFFIC MANAGER ELLIS DESCRIBING SHIPMENTS FROM KIEFER, DRUMRIGHT, AND JENKS AS "GASOLINE" IN ASKING REDUCTION OF RATES THEREON

As already noted, the record contains certain letters from the defendant's traffic manager, Ellis, to the carrier's traffic officials, and certain replies by them, in

which both Ellis and they distinguish between the *northbound* shipments of "*naphtha*" and the *southbound* shipments of "*gasoline.*"

Before referring to this Ellis correspondence, all of which precedes the period of indictment, it is desired to refer to Government Exhibit No. 75 (Rec. 1293) which was a letter written during the period of the indictment, February 10, 1917, from W. P. Donovan, General Superintendent of the Gypsy Oil Company, to P. T. McKirahan, General Agent of the A., T. & S. F. Railway Company. That letter had reference to the construction of loading racks at the defendant's casinghead gasoline plant at Drumright. It must be remembered that the defendant's counsel admitted (Rec. 179) that the only thing produced at its plants was casinghead gasoline. Throughout Mr. Donovan's letter, the racks are referred to as *gasoline* loading racks, and there are repeated references to the danger of handling *gasoline*, to the Bureau of Explosives' regulations for handling *gasoline*, and to *gasoline* shippers. This latter reference is immediately after a reference to a meeting of the "Executive committee of the Casinghead Gasoline Producers Association of America" "to discuss the shipping of casinghead gasoline from all angles." Mr. Donovan writes:

> I feel that nearly all the *gasoline* shippers want to work in harmony with the railroads, etc.

Ellis, on January 18, 1914, wired the General Freight Agent, Kansas City Southern Railroad:

> Requested Powers Docket rate 33¢ *Kiefer to Port Arthur* on *gasoline* for coastwise shipments. (Government Exhibit 90, Rec. 1366.)

On January 19, 1914, he wired the same party:

> Exchange telegram relative 33-cent rate Kiefer to Port Arthur. In addition to this *southbound* rate we are figuring on moving about 50 cars per month or more of *naphtha from Port Arthur to Kiefer*. Have talked with Powers, St. Louis, long distance. * * * Use your influence with other lines. (Government Exhibit 91, Rec. 1366.)

On January 19 he wrote Powers, Assistant General Freight Agent, St. Louis & San Francisco Railroad:

> Referring to my long-distance telephone conversation this morning relative to docketing subject for San Antonio Meeting to-morrow rate 33 cents per hundred pounds *naphtha from Port Arthur* and West Port Arthur to *Kiefer, Okla.* We are figuring on from 50 to 75 cars of naphtha from *Port Arthur to Kiefer.* * * * This *naphtha* is *being moved from Port Arthur to Kiefer* to be further refined at that point in connection with products now at Kiefer, *and the outbound shipments will consist of gasoline*, and for each car of naphtha moved into Kiefer there is approximately *two cars of gasoline outbound.* (Government Exhibit 92, Rec. 1367.)

On January 19, 1915, Christian, of the Sunset Central Lines, and Riley, of the Frisco Lines, wrote a joint letter to Ellis, reading in part as follows:

> Referring to conversation yesterday morning concerning your application for rate of 15 cents on *naphtha from Port Arthur to Kiefer* as a traffic proposition.
>
> You are advised that in view of this *commodity having passed beyond the crude state, it necessitated giving consideration to a reduction in the refined product.*
>
> * * * It has occurred to us that possibly you would not insist upon the *northbound* rates being disturbed for so small a distance, which we feel can have but one result, namely, the corresponding differences *southbound.* (Government Exhibit 93, Rec. 1368.)

NOTE.—(Apparently the three letters preceding the above should have been dated 1915 instead of 1914.)

On February 9, 1915, Ellis wrote Christian and Riley jointly:

> * * * "We have gone into this matter from all angles and am going to ask that you arrange for the publication of rate 40 cents from Port Arthur to Kiefer and 30 cents from Kiefer to Port Arthur. * * * applying on naphtha and *gasoline.*" (Government Exhibit 88, Rec. 1365.)

On March 18, 1915, the Assistant Freight Traffic Manager of one of the lines wrote Ellis:

> Referring to your joint letter of February 9, File 17-A, regarding publication of rate of 30 cents *on naphtha from Port Arthur, Tex., to*

> *Kiefer, Okla.*, also the same rate in the *reverse direction* on *gasoline.* * * * Your application has been given careful consideration and this is to advise that in view of the present conditions, that particular traffic not yielding sufficient revenue to pay the cost of operation, and the further fact that we are now endeavoring to increase rather than reduce rates, it will be impracticable to establish the rates at this time which you propose. (Government Exhibit 89, Rec. 1365, 1366.)

A copy of this letter was sent to Christian of the Sunset Central Lines.

On May 16, 1916, Ellis wrote Riley of the Frisco, with copies to Christian, Mitchell, and others:

> All of our products from Port Arthur and North Port Arthur is an unfinished product and is passed through the *refinery* at Kiefer, *and the products secured from this partial refining at Kiefer* is an unrefined product and is transported to our Port Arthur refinery, and at that point further refined, and we are entitled to the unrefined rate as above. (Government Exhibit No. 97, Rec. 1376.)

On the same date Ellis wired Riley in part:

> Will you please arrange through South Western Committee for publication 30-cent rate *crude unfinished naphtha, Port Arthur* and West Port Arthur *to Kiefer and Kiefer to Port Arthur* and West Port Arthur, etc. (Government Exhibit 98, Rec. 1377.)

On May 29, 1916, Powers of the Frisco wrote Mr. Ellis under the heading *"Gasoline—Rates on from Points in Oklahoma, Beaumont-Port Arthur District":*

> Someone has suggested the cancellation of Item 2546–B, Supplement 40, SWL Tariff 26–T, offering as an excuse that the continuation of this figure may jeopardize rates of 27 and 29 cents, respectively, to this common point territory.
>
> We shall be governed by your requirements in the premises as to the cancellation of Item 2546, and shall thank you to advise fully by return mail. (Government Exhibit 86, Rec. 1364.)

On June 5, 1916, Ellis wrote Powers in part:

> We do not want this rate canceled as it is in daily use. We are now moving about 18 cars per week on this rate. (Government Exhibit 87, Rec. 1364.)

These letters clearly show that Ellis, having been refused a reduction by the carriers on the refined product when he correctly described his *southbound* shipments from Kiefer and Drumright as *gasoline*, and his *northbound* shipments as *naphtha*, conceived the idea of getting the reduction by confusing the character of the *northbound* shipments of *naphtha* with the *southbound* shipments of *gasoline*, under a common name of "crude unfinished naphtha," though both commodities were actually refined.

Moreover, a reference to the testimony of Powers (Rec. 533 to 539, 559 to 567) then Assistant General Freight Agent of the Frisco, and of Reilly (Rec. 567 to 576) will substantiate this.

Powers says (Rec. 563) that Ellis explained that he had a quantity of *low grade naphtha at Port*

Arthur, which it was desired to move to Kiefer, providing rates would be established that would warrant moving it up there, and working it through the Kiefer plant, and then moving it back to Port Arthur and then reworking it again and putting it on the market. *He said he was going to ship naphtha under the rate.* That it was a low-grade article to be shipped and treated and reshipped to Port Arthur to be further finished. (Rec. 565.)

Reilly says (Rec. 571) that in publishing a rate on crude naphtha, or unrefined naphtha, or unfinished naphtha, they put it in on the regular basis.

> The COURT. Without any investigation of what it was?
>
> A. Well, your Honor, that is impossible. We can not go out into the field. We don't know what is being shipped; we are hundreds of miles removed from the shipping point. (Rec. 571.)

He later says (Re. 57c4) that they had in mind the tariff rate that had been published in accordance with the Commission's decision in *National Refining Company* v. *M., K. & T. Ry.*, 23 I. C. C., page 527, involving rates from Oklahoma and Kansas to Baton Rouge.

A reference to the Commission's decision, however (Rec. 1378), will show that the commodity before the Commission was *a distillate from crude oil, and not a condensate from casing-head gas*, but that even so the Commission held *the gasoline rates legally applicable*, but merely unreasonable to the extent they exceeded

by two cents per hundred pounds the rates contemporaneously applicable on crude oil.

Yet it is of this decision that the Court of Appeals, in its opinion, declares (Rec. 1690):

> In the light of the ruling of the Interstate Commerce Commission in the National Refining Company case, the rate on unrefined naphtha theretofore given by one of the carriers to Baton Rouge on a commodity *shown to be substantially the same as a condensate* of the Gypsy Company's plants, and the testimony in this case we think the insistence (that the conduct of the defendant was fraudulent) groundless, and must have been highly prejudicial.

In the light of Ellis's letters, and of his independent representations to the carriers, the Government is forced to repeat the charge that the conduct of the defendant was fraudulent in obtaining the publication of a rate on an anomalous commodity such as "unrefined naphtha," and in applying such a rate to casing-head gasoline, blended or unblended, without disclosing to the carriers the true nature of the commodity which was being shipped.

II

None of the Alleged Errors Pointed Out by Circuit Court of Appeals Constitutes Reversible Error

Reference has already been made under I (c) to the alleged error in the admission of evidence that both prior and subsequent to December 2, 1916, all other shippers shipped and described similar ship-

ments as gasoline, between these same points, and between other points as well. It should be again noted, however, that Mr. Swacker's admission (Rec. 427) in this respect, was a broad admission that League would so testify, and his subsequent misleading questions to League do not render this admission incompetent, but at most, go to its weight.

The alleged error in permitting evidence of erasures of the word "gasoline" from defendant's book records of shipments embraced by the indictment, it has been shown I (d), is due to some inexplicable ignoring upon the part of the Circuit Court of Appeals, of the defendant's admission that such erasures had been made by an employee of the defendant subsequent to an inspection of the books by an examiner of the Interstate Commerce Commission.

Likewise, it is shown under I (e) that there is not the slightest ground for the apparent conclusion of the Circuit Court of Appeals that evidence was inadmissable of the mutilation of the defendant's records by cutting off headings describing shipments embraced by the indictments as "gasoline."

It only remains to refer to the alleged error in the remarks of counsel for the defendant to the jury.

One of Government counsel made the following statement in his argument to the jury:

> Mr. Tabor, the vice president of the company, quoted a list of works of about 150 perhaps, all told, on the subject of naphtha, but when it came to the subject of how many of those dealt with unrefined naphtha he was

> crowded back to the conclusion that there was but one man and that he had been quoted by another, and one of those men was the employee, or rather came from the Mellon Institute in Pittsburgh. Now, what is this Mellon Institute? It is an institution that was founded by the Mellon family, of Pittsburgh. Mr. W. L. Mellon is president of the Gulf Oil Corporation. (Rec. 905.)

Counsel for defendant interposed objection to these remarks, and the trial court promptly admonished the jury not to consider them. The following is quoted from the record:

> By Mr. DIGGS. If the court please, we except to that as no evidence in the record showing Mr. Mellon's connection with this company, W. L. Mellon, as president, the evidence being that the sworn evidence of George S. Davis was president.
>
> By the COURT. Yes.
>
> By Mr. GANN. He was president of the Gulf Oil Corporation.
>
> By Mr. DIGGS. No evidence connecting him with this case at all.
>
> By the COURT. Yes; there is not any evidence here, and the jury will not consider it. (Rec. 905–6.)

As to the other remarks of Government counsel which were assigned as error: No objection was interposed to these remarks at the time. (See pp. 906–908 of the record, in which the statements of Government counsel are quoted and showing that defendant made no objection at the time.) The record

shows that those statements were made on April 22, 1920. (Rec. 899.) On the morning of April 23, as one of Government counsel was about to resume his argument to the jury, the court interposed and made the following statement to the jury:

> By the COURT. Wait a minute. Now, gentlemen of the jury, the defendant makes the following exception: The defendant excepts to the comment of the Government's counsel Gann and Chambers suggesting that the United States Government is pecuniarily affected by the matter under consideration, the defendant not being on trial on a charge of defrauding the United States, and also except to the comment of Government counsel Chambers upon the wealth of the defendant, such comment to the jury being highly improper and calculated to inflame, and defendant moves the court to instruct the jury to especially disregard such remarks. And defendant also excepts to the statement of Mr. Chambers to the jury charging the defendant had violated the safe transportation rules, such charge being contrary to the fact and admission of the Government and calculated to inflame; and defendant moves the court to especially instruct the jury regarding it. *Now, yesterday both sides on these points, to my mind, went outside the proper domain; as there was no objection, I permitted them to do that.* One side charged in the argument that the railroads, a part of the time when the country was at war, were under Federal control. Then the statement was made about what the result would be affecting members of the jury.

> That has nothing to do with this case. Then the other side said how it affected their clients, how they could be made to refund in civil damages. So I admonish you to try the case according to the evidence. Hear the arguments of the attorneys, and when they are sound, if they are sound, that is for you to determine. If they do not confine themselves to the evidence in the case, that is for you to determine. The case is to be tried without fear or favor, without any regard as to how it affects people, but solely with a view of the weight of evidence as to be determined by the jury and as to the law to be given you. *The exception was made on the reconvening of court* and after the argument had been made the previous day, but before the arguments were finally concluded. (Italics ours; some slight changes have been made in the phraseology of the above statement as reported on pages 908 and 909 of the record to correct what are obviously stenographic errors.)

Special attention is called to the statement of the court that *both sides* went outside of the proper domain of argument. The Government counsel were not the only ones that offended in this regard. But the fact that the trial court especially admonished the jury concerning the remarks of counsel and instructed the jury to disregard such remarks cured any error that was made in this regard. And this seems to be especially true in this case, because the court admonished the jury a second time to disregard improper arguments. Just before the trial judge

made his general charge to the jury he admonished the jury as follows:

> By the COURT. Gentlemen of the jury, before I begin the charge I will read to you what I said this morning. Now, on yesterday both sides on these points, to my mind, traveled outside of the domain of proper argument. I permitted them to do this, no objection being made by either side at the time. One side suggested in the argument that the railroads a part of the time were under Federal control, being in the hands of the Director General; in another statement that was made, that the result of the verdict might affect the interests of the taxpayers, including the interests of the jurors, or in substance that. That on the part of the defendant it was adverted to the fact that the defendant could be made to refund in a civil suit. The jury are admonished that the case is to be tried according to the evidence and the admissions. The jury are to hear the arguments of the attorneys and when they consider the arguments sound as relating to proved facts from the evidence admitted in the case and the admissions in open court before the jury, that is for them to determine. If the attorneys do not confine themselves to the evidence and admitted facts in the case, the jury should disregard such argument. The case is to be tried without fear or favor and without prejudice, and without any regard to the pecuniary effect upon anyone, but solely with a view of justice. As regards the safety

> appliances, it is my understanding there is no contention of any violation of the same by the defendant in observing regulations prescribed as precautions to safety. That is for the purpose of reading that in the record and is an admonition to the jury. (Rec. 911.)

If any of the improper remarks made on either side tended to prejudice the jury, this double admonition by the court to the jury to disregard such remarks clearly would offset any such prejudice. It is well established that error of counsel made during the course of a long argument to the jury and after a long trial is not an incurable one, and if the error is objected to and the court instructs the jury to disregard such statements, the error is cured.

> *United States* v. *Snyder*, 14 Fed. 544, 557.
>
> *Carroll* v. *United States*, 154 Fed. 425, 430 (C. C. A. 9th Cir.).
>
> *Ammerman* v. *United States*, 185 Fed. 1 (C. C. A. 8th Cir.).

III

To permit either the Circuit Court of Appeals or the trial court on a new trial to disregard the positive requirements of the carrier's published tariffs and of the Commission's regulations for the transportation of dangerous articles, both of which require the description of these articles as gasoline, would be to vitiate the powers conferred upon the Interstate Commerce Commission under sections 1, 6, 13, and 15 of the Interstate Commerce Act, and to nullify the powers of the Government under the so-called Transportation of Explosives Act, Criminal Code, sections 233 to 236

The binding legal effect of the tariff provisions of the Western Classification requiring that—

> Condensates of casinghead gas when reduced to a maximum vapor pressure of ten pounds per square inch and shipped either alone or blended with other petroleum products, be shipped and described as gasoline, casinghead gasoline, or casinghead naphtha,

has already been commented upon under I (a) of this brief.

The compelling evidentiary effect of such tariff provisions aside from their conclusive legal effect, was also there commented upon.

It will now be shown that to permit the Circuit Court of Appeals, or the trial court on new trial, to ignore these mandatory requirements not only of published tariffs, but of the Commission's Regulations for the Transportation of Dangerous Articles, would be to nullify both the Commission's powers under the Interstate Commerce Act, and the Government's powers under the Transportation of Explosives Act.

It should be understood that this is the inevitable effect of a failure to correct the opinion of the Circuit Court of Appeals herein, even though in this case the Government admitted that the Commission's Regulations for the Transportation of Dangerous Articles had been complied with, so far as the placarding of the cars embraced by the indictment was concerned. (Rec. 225, 226, 230.) Indeed evidence of a violation of the provisions of the Criminal Code for the Safe

Transportation of Explosives and Other Dangerous Articles, could not properly have been admitted under these indictments charging only violations of the criminal provisions of the Elkins Act.

What it is desired here to point out is that the logical and inevitable effect, however, of allowing the Circuit Court of Appeals, or any other court, to ignore the Commission's administrative regulations requiring the description of these shipments *for shipping purposes* as gasoline, casinghead gasoline, or casinghead naphtha, would be to put it in the power of a court, were the defendants indicted for violation of the Commission's Regulations for the Transportation of Dangerous Articles, to nullify collaterally the Commission's administrative regulations by undertaking to decide that, as matter of fact, the commodities were not gasoline. This the court might do because the court might believe, as here, on the testimony of expert witnesses, that the commodities did not come within the specifications of gasoline for some particular purpose, such as the operation of an automobile engine, or because, on like testimony, the court might differ with the Commission as to the proper chemical designation of such commodities, as distinguished from their designation for tariff and transportation purposes.

That administrative regulations made by Government departments under authority granted by Congress have the force of law, and that violation of them may subject the violator to criminal prosecution, is established by the case of *United States* v.

Grimaud, 220 U. S. 506. That Congress may legally delegate the power to make such administrative regulations to the Interstate Commerce Commission was decided in the case of *Interstate Commerce Commission* v. *Goodrich Transit Company*, 224 U. S. 194. That the Commission's administrative orders can not be set aside by the courts unless the Commission has exceeded the powers conferred upon it, or has acted arbitrarily in the absence of any evidence, has been repeatedly held by this court. See *Interstate Commerce Commission* v. *Union Pacific Railroad Co.*, 222 U. S. 541.

It must likewise be clear that the administrative powers of the Interstate Commerce Commission under Sections 1, 6, 13, and 15 of the Act to Regulate Commerce to prescribe just and reasonable rates and classifications and just and reasonable regulations and practices affecting the manner in which property tendered for transportation shall be marked and described, could be similarly nullified were the court to determine collaterally that, even though the Commission should prescribe the description of such commodities as those here shipped as gasoline, and so classify them for rate-making purposes, that such commodities were not in fact gasoline, in the opinion of the court. The situation in this respect is in no wise changed merely because the provisions of the Western Classification were, as tariff provisions, published by the carriers rather than prescribed by the Commission. As tariff provisions, as already shown under I (a), they were binding upon

the shippers, carriers, court, and Commission alike. Moreover, in this instance they had, in effect, been prescribed by the Commission, it obviously being impracticable to prescribe one description for such shipments under the Commission's Regulations for Transportation of Dangerous Articles, and another description for such shipments under the defendant's tariffs.

Indeed, this very situation illustrates the inherent harmfulness of the device used by the defendant to obtain a lower rate on its shipments of gasoline, than the rates published in the carrier's tariffs, by inducing the publication of a rate on "unrefined naphtha," and by describing its gasoline shipments as such. It is perfectly apparent that reduced rates were finally solicited on "unfinished" or "unrefined" naphtha, and published by the carriers, because the carriers did not wish to endanger the level of their gasoline rates generally, or to give all gasoline shippers the benefit of the reduction. The result is, as shown here, that the defendant by the simple device of obtaining the publication of lower rates on an anomalous commodity described as "unrefined naphtha," and by changing the description of its gasoline shipments to conform to this designation, obtained the sole benefit of the reduced rates, since all other shippers, as this record shows, continued to describe their similar shipments as gasoline, and to pay the higher charges legally applicable to that commodity.

CONCLUSION

In conclusion, therefore, the Government submits that the judgment of the Circuit Court of Appeals should be reversed on the following grounds:

First, that that judgment is unlawful as a collateral attack on, and interference with, the lawful administrative rulings of the Interstate Commerce Commission.

Second, that the judgment ignores the mandatory and binding requirements of the carrier's published tariffs.

Third, that the alleged errors in the District Court upon which that judgment is based did not constitute reversible errors.

Fourth, because the conclusion of the Circuit Court of Appeals that the verdict of the jury was without support in the evidence was based upon an arbitrary disregard by the Circuit Court of Appeals of competent and legal evidence which warranted the jury's verdict; and

Fifth, because, since there was substantial evidence to support the jury's verdict found under appropriate instructions, the Circuit Court of Appeals was without jurisdiction to set that verdict aside merely because it might differ with the jury as to the conclusions to be drawn from that evidence.

Respectfully submitted.

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